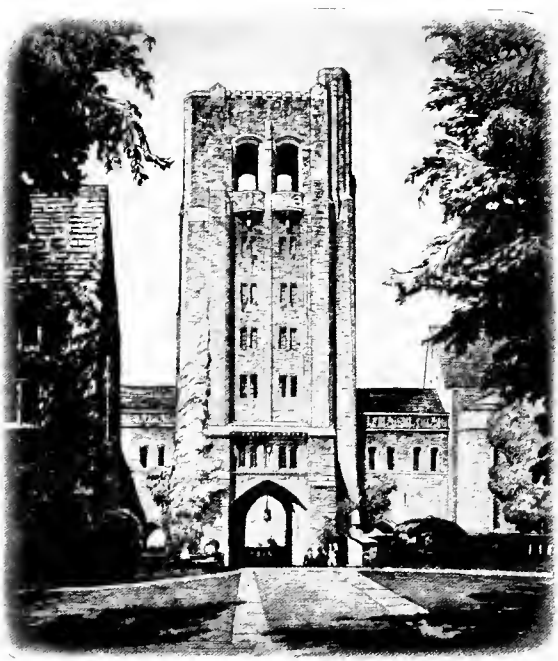

REPORTS OF CASES

DETERMINED

IN THE

ELECTION COURT,

FOR THE

PROVINCE OF NOVA SCOTIA.

Judges *ad hoc* of the said Court.

THE HON. WILLIAM ALEXANDER HENRY, Q.C.
ALEXANDER JAMES, ESQUIRE, Q.C., AND
JAMES WILLIAM JOHNSTON, ESQUIRE, Q.C.

COMPILED BY
BENJAMIN RUSSELL, BARRISTER,
CLERK OF THE COURT.

HALIFAX, N.S.
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1874.

IN THE ELECTION COURT.

"The Controverted Elections Act, 1873."

JONATHAN F. L. PARSONS, Petitioner,
vs.
ALFRED G. JONES, Respondent.

Decision as to time and requisites of filing and presentation of petition.

In this case the Petitioner, on his own affidavit, stating that he had been unable to serve the petition within the time limited by law, obtained an order for extension of time for service in the following terms:

"On reading the affidavit of Jonathan F. L. Parsons and on motion I do order that the time to serve the petition in the above matter be extended, and that such service be made within fourteen days from the date hereof.

"Dated 27th March, 1874.

"(Signed) JAMES W. JOHNSTON,
Judge of Election Court."

A rule nisi to set aside the petition and the above order was taken out on behalf of the Respondent in the following terms:

On reading the petition of the above named petitioner herein, the recognizance and affidavit of justification, and the affidavit and order of petitioner herein for extension of time for service, the affidavits sworn herein on the 2nd April instant of James Sweet and Hugh Kerr, and the affidavits, with the exhibits sworn the same day, of Wallace Graham and Benjamin Russell, and the records and papers herein in the office of the Clerk of the Election Court, and on motion I do order that the said petition and publication thereof, and all proceedings thereon, and the said order for extension of time for service herein, be set aside, quashed and rescinded on the grounds of irregularity, and because said petition was not delivered,

presented or filed according to law and the rules of said Court, and no copy thereof was filed, presented or delivered according to law, and because said order was issued and obtained irregularly, deceptively and not according to law, and on unfounded statements in petitioner's affidavit, and that the petitioner pay the costs of this application, unless cause to the contrary be shewn before me on Friday, the 10th day of April, instant, at Chambers in the County Court House at eleven o'clock, A. M.

Halifax, 2nd April, A. D. 1874.

(Signed) JAMES W. JOHNSTON,
Judge of Election Court.

The above rule was afterwards extended on account of the illness of the Judge, until the seventeenth day of April, A. D. 1874, and was on that day argued before James W. Johnston, Esq., Q.C., Judge of the Election Court, by Hon. James McDonald for the Petitioner, and by Hon. S. L. Shannon, Q.C., and Robert L. Weatherbe, Esq., on behalf of the Respondent. The facts alleged in the affidavits produced at the argument, as well as those contained in the affidavits on which the above rules were taken out, are sufficiently stated in the following judgment:

JAMES W. JOHNSTON, Esq., Q.C., Judge *ad hoc*, now (May 1, 1874) delivered the following judgment:—

On the 27th March last I, as one of the Judges of the Election Court for the Province of Nova Scotia,—on the affidavit of the petitioner and on motion of his Counsel, the Hon. James McDonald, —made an order extending the time for the service of the petition for a period of fourteen days from the date of such order.

On the 2nd day of April last, on application of Mr. Weatherbe on behalf of the Respondent, I granted an order nisi to shew cause why the petition and publication thereof, and the above order, should not be set aside—on the grounds set forth in the rule nisi. This rule was subsequently argued before me by the Hon. James McDonald for the Petitioner, and by Messrs. Shannon and Weatherbe on behalf of the Respondent.

I consider that the 51st of the General Rules of the Election Court for the Province of Nova Scotia, referring all interlocutory questions and matters to one of the election Judges, gives me jurisdiction to hear and dispose of the rule nisi.

A preliminary objection was taken by Mr. McDonald, that a Judge had no power to set aside his own proceedings, but the rule of the 27th March, having been made absolute in the first instance, and having been granted *ex parte*, I consider that the Respondent was at liberty to move to discharge it, provided he could shew sufficient reasons why the rule should not have been granted in the first instance. The principal ground relied upon by the Respondent was that the petition was not filed, delivered and presented according to law—and if that objection is substantiated it must be fatal.

The 11th Section of the Controverted Elections' Act, Cap. 28, 1873, 2nd clause, declares that the petition must be presented not later than thirty days after the publication of the receipt of the return in the "Canada Gazette," and it was admitted by both parties that the 23rd of March was the last day for presentation of any petition against the return of the Respondent. On the 11th March the Court made an order that all petitions against the return of members be filed within the time required by the "Controverted Elections' Act, 1873," and in order to prevent surprise this order was directed to be published in three newspapers for one week. The petitioner in his affidavit, on which he obtained the extension of time, swore positively that the petition was filed on the 23rd day of March instant, in the office of the Clerk, and on the faith of this allegation and also that the Respondent had left the city before personal service could be effected on him, I granted the rule for the extension of time. On the part of the Respondent an affidavit was produced from Benjamin Russell, Esq., the Clerk of the Court, in which he swears positively that the petition was not filed with him, nor as he believes with any person in his office, on the 23rd day of March. He further states, that about 11 in the forenoon on the 24th March, he discovered in a drawer in his office, the petition folded up in another petition, and that he had no knowledge in what manner this petition came to his drawer or office.

Two affidavits in reply were read on the argument, on the part of the petitioner, one from John S. D. Thompson, in which he states that he called on the 23rd day of March at or near six o'clock at the office of the Clerk, and stated to him his desire, that he would remain in his office for a short time to receive a petition which was about to be filed, to which the Clerk replied that he would be in for a short time, about half an hour, but would return to his office about seven, and would remain there, and receive the petition, until the hour of half-past seven. The Hon. James

McDonald also stated under oath that he called at the office of the Clerk on the 23rd March for the purpose of filing with him the petition in this cause, but the door was locked and he could not obtain entrance to the said office, whereupon about half-past seven and not later than twenty minutes to eight he put the petition into the office of the Clerk by shoving it under the door.

Under these facts I am called upon to decide whether the petition was filed in time, and according to law. It is unfortunate that Mr. Parsons in his first affidavit should have sworn positively to a fact which it now appears that he could only have known by hearsay, more especially as in the second clause of the same affidavit he guards himself with the qualification generally used where hearsay is alleged. I can only say that had I been aware that he was not stating what was within his own knowledge, I should have hesitated before granting him the rule for extenson of time without a certificate from the Clerk of the date of the filing.

Mr. Russell has positively sworn that the petition was not filed with him, nor as he believes with any person in his office on the 23rd day of March, and in addition, the petition itself has the following memorandum initialled by him:—"discovered in the drawer appropriated to election proceedings in the Clerk's office, about 11 A.M. March 24th, 1874." I must look upon this affidavit, and the endorsement on the petition as the certificate of an officer touching a matter within the scope of his duty, the truth of which I am not at liberty to try on affidavit but must assume. But if such was not my duty, in view of the facts contained in the affidavits in reply on the part of the petitioner, can it be said that the petition was filed in time?

Business hours in the prothonotaries' and other public offices are from 10 A.M. to 4 P.M., at which latter hour the offices close, and any business transacted after that is contingent upon the chance of finding the officer in. Following this practice, I must hold that the Clerk was not bound to have his office open or any one present to receive papers after 4 o'clock P.M. In England where by rule papers are to be served before 7 o'clock P.M., if made after, the service is deemed as having been made on the following day, and in this country I presume that a paper left in the office after office hours and when there was no officer present to receive it, would be filed as of the day following. The statement of Mr. Thompson that the Clerk told him he would return to his office about seven and remain there and receive the petition until half-past seven, I do not think alters the case, for Mr. McDonald cannot state positively

whether he was at the office at half-past seven or twenty minutes to eight, and it may be that the Clerk left precisely at the half hour, and a few minutes before Mr. McDonald arrived. But even had the Clerk failed to keep his appointment, that would be a matter to be settled between him and the petitioner, and could not be allowed to operate to the prejudice of a party insisting on his strict legal rights.

A question has arisen whether shoving the paper under the door after hours was a compliance with the Act. The 2nd clause of section 11 of the Act is very explicit on this point; "the petition *must be presented, etc.*," and clause 3 of the same section enacts that presentation of a petition shall be made by *delivering* it at the office of the Clerk, or in any other prescribed manner. And by the 2nd rule "the presentation of a petition shall be made by leaving it at the office of the Clerk, who, or his Clerk, shall if required give a receipt." I think that the letter as well as the spirit of the Act requires that the presentation should be made by leaving the paper with some one capable of receiving it, and of giving a receipt for it if required. Where does the responsibility of the Clerk for the petition commence? Evidently from the time when it is presented or exhibited to him, and he has given a receipt for it if required. Supposing the petition had been stolen during the night, or swept into the stove, and destroyed without his knowledge, that any petition had been in his office, the Clerk upon no principle that I am aware of could be held liable for its loss when he was in total ignorance of its existence, and yet the law unquestionably fixes him with such liability after the petition has been presented or filed with him. And the fact that the petition was not stolen or destroyed, but was discovered the next day stowed away inside of a petition in another matter, does not alter the case.

That the Clerk himself was no party to any arrangement by which shoving this petition under the door was to be held equivalent to leaving it with him, or as presentation of it is evident from Mr. Thompson's affidavit, in which he states, that the Clerk promised to remain in his office until half-past seven and *receive* the petition, which clearly negatives any intention on his part to consider putting the petition under the door as equivalent to a presentation of it. Mr. Thompson requested the Clerk to remain in his office to receive a petition which was about to be filed, and then adds "meaning the petition against the above-named Respondent"; but there is nothing to show that he informed the Clerk what petition he was to wait to receive, and from Mr. McDonald's affidavit it appears

that the office-boy picked the petition up from the floor the following morning on entering the office. I fail to perceive in all this performance of one act essential to the presentation or filing of the petition.

From a careful consideration of this matter I have arrived at the conclusion,—1st That I am bound by the affidavit and endorsation of the Clerk of the Court to decide that the petition in this case was not presented or filed within the time required by the Act, and 2ndly that the facts as stated in the affidavits of Messrs. McDonald and Thompson do not amount to a compliance with the Act, and that therefore there was no petition before the Court at the time the order for extension of time was moved for.

My opinion being as above on the main point, I deem it unnecessary to go into the consideration of the other grounds stated in the rule nisi, though I have examined them with some care. I have no alternative but to make the rule nisi absolute, and with costs.

In accordance with the above judgment an order to quash the petition and the order for extension of time for service passed in the following terms:—

On argument of the rule nisi herein granted by me, dated 2nd April, 1874, to set aside, quash and rescind the petition herein and the order for extension of time for service, I do order that the said *rule nisi* be made absolute with costs, and that said petition and order and all proceedings thereon be set aside, quashed and rescinded.

Dated May 1st, A.D. 1874.

JAMES W. JOHNSTON,
Judge of Election Court.

GEORGE HIBBARD, Petitioner,

VS.

CHARLES TUPPER, Respondent.

Decision as to security. Whether one surety sufficient.

In this case the surety and recognizance given by the Petitioner were objected to on the ground, among others, that there was but one surety given. A summons was taken out April 6th on behalf of the Petitioner, to shew cause why the security should not be declared sufficient.

The matter was argued before the Clerk of the Court by R. L. Weatherbe, Esq., on behalf of the Petitioner, and J. S. D. Thompson, Esq., on behalf of the Respondent.

BENJAMIN RUSSELL, ESQ., *Clerk of the Court*, now (April 10th) delivered the following decision:—

Several objections were filed to the recognizance and security in this case, but the only ground relied on at the hearing was that the recognizance had been entered into by only one surety. The argument in support of the objection is based altogether upon Section 11, Sub-section 5, and certain expressions in Section 12 of the Act, taken in connection with Rules 24 and 25 of the Election Court. If the effect of the expressions relied upon, in these Sections and Rules had not already been settled by very high judicial authority, it might be necessary to go back to first principles in the construction of doubtful clauses, but I find that I am relieved of the necessity of instituting any original inquiry by a decision of WILLES, J., which, as I view the matter, conclusively settles the question. In order to show that this decision is precisely applicable to the matter in hand, I shall quote the sections of the English Act and Rules side by side with the corresponding sections of the Dominion Act and the Rules of

this Court upon which the argument in support of the objection is based:—

CANADA ACT.	ENGLISH ACT.
Sec. 11, *Sub-sec.* 5. The security shall be to the extent of One Thousand Dollars. It shall be given either by recognizance *to be entered into by any number of sureties not exceeding four*, or by a deposit of money with the Clerk of the Election Court, if no other manner be prescribed, or in the prescribed manner if any, or partly by recognizance and partly by such deposit.	*Sec.* 6, *Sub-Sec.* 5. The security shall be to an amount of One Thousand Pounds. It shall be given either by recognizance *to be entered into by any number of sureties not exceeding four*, or by a deposit of money in manner prescribed, or partly in one way and partly by another.
Sec. 12. * * * It shall be lawful * * to object in writing to such recognizance *on the ground that the sureties or any of them are insufficient, or that a surety is dead.* * *	*Sec.* 8. It shall be lawful * * to object in writing, *on the ground that the sureties or any of them are insufficient, or that a surety is dead*, or cannot be found.
NOVA SCOTIA RULES.	ENGLISH RULES.
Rule 24. There may be one recognizance *acknowledged by all the sureties or separate recognizances by one or more*, not exceeding four, as may be convenient. * * *	There may be one recognizance *acknowledged by all the sureties or seperate recognizances by one or more* as may be convenient.
Rule 25. The recognizance shall contain *the name and usual place of surety, &c.*	The recognizance shall contain the *usual place of abode of each surety, &c.*

I have italicised the words in the Canada Act and the Nova Scotia rules upon which reliance is placed, and it will be found on inspection of the English Act and Rules that the phraseology is not only essentially but precisely identical with that of the corresponding clauses and sections of the English Rules and Act. Whatever arguments can properly be applied to the Canadian Act and the rules of this Court, could therefore with equal propriety have been used in expounding the meaning of the English statute and rules. Yet I find that WILLES, J., in December, 1868, held that "one surety was sufficient, one being a number not exceeding four." In the light of this decision, I cannot do otherwise than decide that the objection is futile. The argument drawn from the form of the recognizance in this Court points very strongly to the intention of the Court that there should be but one surety required. In the first form given in the rule, the initials are supplied for the name of only one surety, and the whole sum of One Thousand Dollars is mentioned in the body of

the form without any parenthetical clause to provide for its subdivision. I attach no importance to the use of the plural, (to which I believe my attention was not directed,) in the parenthesis given for the signature of the surety, as this is easily accounted for when it is considered that the form is derived indirectly from the English rules, in which only one form is given and made applicable, as I understand it, to the case where there is but one, or to the case where there are more than one surety. Still less do I attach any importance to the note appended to the statement of the decision of WILLIS, J. above recited, that "an appeal is understood to be pending against the decision." I have not been able to learn that the decision has been reversed, and it is not even positively stated that the appeal was actually taken out. In the meantime the judgment of so eminent an authority furnishes guidance that I am contented to rely on until it is discredited by some competent tribunal.

In accordance with the above decision an order passed in the following terms to declare the security sufficient:—

On reading the recognizance filed herein, the affidavit of justification filed herein, and the objections to the surety and to the said recognizance, the summons issued on behalf of the petitioner to declare the security sufficient and the papers or file, the sufficiency of the same is hereby declared established within the meaning of the Thirteenth Section of "the Controverted Elections Act, 1873."

BENJAMIN RUSSELL,

Clerk of the Court.

From this order an appeal was taken out on behalf of the Respondent, and the question was re-argued before Hon. W. A. Henry, Q.C., who now (June 26) delivered judgment as follows:—

This case came before me on an appeal from a judgment and an order delivered and made by Mr. Russell, the Clerk of this Court, on the tenth day of April last, declaring the sufficiency of the bail herein, and was argued by Counsel before me. They referred to the judgment, the recognizance, the general rules of this Court, and the law bearing on the objections to the bail. The point of objection and the only one raised before me was the same as that stated in the judgment appealed from,—that is, that there was "but one surety in the recognizance."

I have fully considered that objection, and however unwilling to give effect to it as one of a mere technical character where the inability to respond of the surety was not attacked or even suggested, and consequently no injury expected to be done to the Respondent. I would nevertheless have felt bound to do so could I conclude that more than one were, under the circumstances, legally necessary. On the contrary, however, I concur as well in the finding of Mr. Russell as in the reasons given for the conclusions arrived at by him as to the construction of the rules. The correctness of his conclusions may be further seen by reference to section 25 of those rules—The first form of recognizance there given is for one surety only as appears by the words "came A. B. of *(name and description as above deseribed)*, and acknowledged himself, &c.,"—showing that it is intended but for one person, whilst the second form provides for any number up to *four* (which is the limited number):—"and acknowledged themselves," &c., are the words immediately following. Besides, the second form is headed by these significant words: "In cases where the recognizance is entered into by more than one surety,"—showing, by irresistible implication, a recognizance to be good if under the first form signed by even only one surety.

My attention moreover was called on the argument to Sub-Section 17 of Section 7, Cap. 1, of the Dominion Act, 1867, for the interpretation of statutes (which is identical in language with Sub-Section 20 of Cap. 1 of the Revised Statutes of Nova Scotia, 3rd series.) It provides as follows,—"the word 'sureties' shall mean sufficient sureties and the word 'security' shall mean sufficient security, and when these words are used one person shall be sufficient therefor, unless otherwise expressly required." Whatever conclusion might otherwise have been arrived at on the point in question, but one, in view of this legislation directly in point, can be properly reached, and as neither the statutes nor rules "expressly require" more than one surety, I consider myself bound by these plain words of the Statutes and for all the reasons given, to dismiss the appeal with costs.

In accordance with the above judgment an order passed in the following terms: —

On hearing read the papers on file in this cause the order of the Clerk of this Court, dated the 10th April, 1874, declaring the sufficiency of the security filed herein established, the appeal therefrom,

and after argument of the said appeal, I do order that the said order of the Clerk of this Court be confirmed, and that the said security be declared sufficient and the sufficiency of the same is hereby declared established within the meaning of the 13th Section of the "Controverted Elections Act, 1873," and that the said appeal be dismissed with costs.

Halifax, 26th June, 1874.

(Signed.) W. A. HENRY,

Judge of Election Court.

ROBERT DOULL, Petitioner,

vs.

JAMES WILLIAM CARMICHAEL and JOHN ADAM DAWSON, Respondents.

Decision on preliminary objections. Questions as to sufficiency of petition.

In this cause the petition was filed in the following form:—

IN THE ELECTION COURT.

The Controverted Election Act, 1873.

Election for the County of Pictou holden on the Fifth day of February, in the year of our Lord One Thousand Eight Hundred and Seventy-four.

The petition of Robert Doull of Pictou, in the County of Pictou, Esquire, whose name is inscribed hereto,

Respectfully sheweth:

1. That your petitioner was a candidate at the above election, and claims to have a right to be returned at the above election.

2. Your petitioner states that the election was holden on the Fifth day of February last, when James William Carmichael, John Adam Dawson, the Honorable James McDonald, and your petitioner were candidates, and the Returning Officer has returned the said James William Carmichael and John Adam Dawson as being duly elected.

3. Your petitioner complains that the said James William Carmichael and John Adam Dawson were unduly elected and unduly returned at said election.

4. And your Petitioner says that the votes of divers persons not duly registered or entered, in the then last legal and proper revised and certified list of voters for the said county, according to the provisions of the several acts in force, in that behalf were tendered to and received and recorded, or caused to be recorded by the said Returning Officer, and the Deputy Returning Officers at the various polling places comprised within the said county at the said election, for and on behalf of the said James William Carmichael and John Adam Dawson at said election, notwithstanding the same were objected to by and on behalf of your petitioner.

5. And your petitioner says further that no legal or proper alphabetical list of the electors of the said county of Pictou, qualified to

vote at the election of members to serve in the House of Commons of Canada as provided by the tenth section of chapter 27 of the Acts of the Parliament of Canada for 1873, entitled, "An Act to make temporary provision for the election of members to serve in the House of Commons," was ever prepared or filed with the Clerk of the Peace for the said county of Pictou, but an illegal list, purporting to be such legal and proper alphabetical list of electors was the only list used as the correct and legal list of electors at such election; whereas the legal and proper list of electors which had been last made and completed previous to such election should have been used thereat for the purpose of such election instead of such illegal list.

6. And your Petitioner says further that the votes of divers persons who had respectively been guilty of bribery, and of divers persons who had respectively been bribed within the meaning of the Acts in force in that behalf were tendered to and received and recorded or caused to be recorded by the said Returning Officer and the several Deputy Returning Officers aforesaid at the polling places aforesaid, for and on behalf of the said James William Carmichael and John Adam Dawson, and each of them at said election, notwithstanding the same were objected to by and on behalf of your Petitioner.

7. And your Petitioner says further that the votes of divers persons who had respectively been guilty of corrupt practices within the meaning of the laws in force on that behalf, and "the Controverted Election Act of 1873" were tendered to and received and recorded or caused to be recorded by the said Returning Officer and the several Deputy Returning Officers aforesaid at the polling places aforesaid, for and on behalf of said James William Carmichael and John Adam Dawson, and each of them, at the said election, notwithstanding the same were objected to by and on behalf of your Petitioner.

8. And your Petitioner says further that the votes of divers persons who were not by law entitled to vote at the said election, were tendered to and received and recorded or caused to be recorded by the said Returning Officer and the several Deputy Returning Officers aforesaid, at the polling places aforesaid, for and on behalf of the said James William Carmichael and John Adam Dawson at the said election, and for and on behalf of each of them, notwithstanding the same were objected to by and on behalf of your Petitioner.

9. And your Petitioner says further that the votes of divers persons who were not by law entitled to vote in the respective polling sections in which their votes were tendered and received and recorded or caused to be recorded in such polling sections by the said Returning Officer, and the several Deputy Returning Officers aforesaid, for and on behalf of the said James William Carmichael and John Adam Dawson, and each of them at said election, notwithstanding the same were objected to by and on behalf of your Petitioner.

10. And your Petitioner says that the votes of divers persons who had respectively within the period of twelve calendar months

next before the day of said election, received aid as paupers under the Poor Laws of the Province, or aid as poor persons from public grants of public money, were tendered to and received and recorded, or caused to be recorded by the said Returning Officer, and the several Deputy Returning Officers aforesaid, for and on behalf of the said James William Carmichael and John Adam Dawson, and each of them at the said election, notwithstanding the same were objected to by and on behalf of your Petitioner.

11. And your Petitioner says further that the said James William Carmichael and John Adam Dawson, and each of them and each of their agents and servants were respectively guilty of bribery and corrupt practices, and of using undue influence and intimidation at such election within the meaning of the "Controverted Election Act of 1873," and the several other acts in force in that behalf.

12. And your Petitioner says further that the said James William Carmichael and John Adam Dawson, and each of them and and each of their agents and servants, threatened certain electors guilty of bribery and corrupt practices, and of employing means of corruption with the intent to corrupt and bribe certain of the electors qualified to vote at said election to vote for the said James William Carmichael and John Adam Dawson or one of them at such election.

13. And your Petitioner says further that the said James William Carmichael and John Adam Dawson, and each of them and each of their agents and servants, threatened certain electors them, the said James William Carmichael and John Adam Dawson, qualified to vote at said election that if they did not vote thereat for or for one of them, they would lose certain offices and salaries held by and coming to them.

14. And your Petitioner says further that the said James William Carmichael and John Adam Dawson, and each of them and each of their agents and servants respectively, threatened certain electors at such election qualified to vote thereat, of whom some held offices under the Government of Canada, and others under the Government of Nova Scotia, that if they did not vote for them, the said James William Carmichael and John Adam Dawson, or one of them, they would lose said respective offices so held by them as aforesaid.

15. And your Petitioner says further that the said James William Carmichael and John Adam Dawson, and each of them, and their and each of their agents and servants at such election, were guilty of bribery and corrupt practices, and of employing means of corruption with the intent to keep back certain said electors qualified to vote at said election from voting for your Petitioner and the said Honorable James McDonald, or one of them.

16. And your Petitioner says further that the said James William Carmichael and John Adam Dawson, and each of them, and their and each of their agents and servants, at said election, threatened certain of the electors qualified to vote at such election,

that if they did not abstain from voting for your Petitioner and the said Honorable James McDonald, or one of them, they would lose certain offices and salaries held by them and coming to them, for the purpose of keeping back certain said electors, qualified to vote at said election, from voting for your Petitioner and the said Honorable James McDonald, or one of them.

17. And your Petitioner says further that the said James William Carmichael and John Adam Dawson, and each of them, and their and each of their agents and servants respectively, threatened certain electors at such election who were qualified to vote thereat, of whom some held offices under the Government of Canada, and others under the Government of Nova Scotia, that if they did not abstain from voting for your Petitioner and the Honorable James McDonald, or one of them, they would lose said respective offices so held by them as aforesaid, for the purpose of keeping back said electors from voting for your Petitioner and the Honorable James McDonald, or one of them.

18. And your Petitioner further says that the said Returning Officer and several Deputy Returning Officers aforesaid, in the said several polling places at said election, illegally and improperly refused to receive and record, or cause to be recorded, the votes of divers electors qualified to vote at said election, who tendered and offered their votes to said Returning Officers aforesaid to vote for your Petitioner at said election.

19. And your Petitioner says further that the said James William Carmichael and John Adam Dawson, and each of them, and each of their agents and servants at said election, at the costs and charges of the said James William Carmichael and John Adam Dawson, or one of them, opened and supported a house or houses of public entertainment for the accommodation of electors thereat.

20. And your Petitioner says further that on the day to which the said Returning Officer had adjourned his Court after said election for the purpose of declaring which of said candidates were elected, and after the votes had been counted by the said Returning Officer, your Petitioner demanded a scrutiny of the votes polled for the said James William Carmichael and John Adam Dawson respectively, under and by virtue of Chapter 8 of the Revised Statutes of Nova Scotia (second series), but the said Returning Officer improperly and illegally refused to hold such scrutiny or to proceed therewith.

21. And your Petitioner says further that if the said votes of the said persons respectively mentioned and referred to in the foregoing paragraphs of this petition as having respectively illegally voted for the said James William Carmichael and John Adam Dawson at the said election, had not been received or recorded for and on behalf of the said James William Carmichael and John Adam Dawson at the said election, and if the votes of those who offered to vote for your Petitioner thereat, and whose votes were illegally refused by said Returning Officer and Deputy Returning Officers aforesaid, had been received and recorded for your Petitioner, the number of votes taken and recorded at the said election for and on

behalf of your Petitioner would have exceeded the number taken and recorded for the said James William Carmichael and John Adam Dawson, or one of them.

22. And your Petitioner says further that a greater number of persons legally entitled to vote at the said election voted and tendered their votes for your Petitioner than for the said James William Carmichael and John Adam Dawson, or one of them.

Therefore and for the other reasons in the several paragraphs of this petition contained, your Petitioner prays that it may be determined that the said election of the said James William Carmichael and John Adam Dawson, or one of them, is null and void, and that they, or one of them, were or was not duly elected or returned, and that your Petitioner was duly elected, and ought to have been and should be returned.

And as in duty bound your Petitioner will ever pray, &c.

Dated at Halifax, this 13th day of March, A.D. 1874.

(Signed.) ROBERT DOULL.

The following preliminary objections were filed on behalf of Respondents, by Wallace Graham, Esq., as Attorney and Agent:—

The said Respondents, by way or preliminary objections and grounds of insufficiency against the petition herein, and the complaints therein contained, and any further proceedings thereon, say:—

1. Said petition differs materially in form and substance from the requirements of Chapter 28 of the Acts of 1873 of the Parliament of Canada, and the rules made thereunder, and the other acts and the law in that behalf, and is wholly insufficient.

2. It does not appear by the said petition or any part thereof, that the same is made in relation to anything done in the Dominion of Canada, or in what part or Province thereof, or that the Petitioner resides in the Dominion of Canada, or in what part or Province thereof, or that the same contains any complaint within the scope or jurisdiction of the said Act or any Act of the Parliament of Canada, or that the election complained of was held within the Dominion of Canada or any or what part or Province thereof.

3. As to the several paragraphs and complaints of said petition there is not in any of the said paragraphs or all thereof any complaint sufficiently and legally set forth to show any undue return or to entitle Petitioner to the relief sought by said petition.

4. As to the 4th paragraph of said petition it does not shew that the persons voting for the said Respondents were not legally entitled, under the several Statutes in that behalf, to vote for them, though not on the said list, and it is not alleged that they were counted for said Respondents or either of them, or that they were

not struck off, or that the objections were duly made at the proper time.

5. As to the 5th paragraph of said petition there is nothing to show that the Petitioners objected or did not waive any claim they had, and as far as appears the alleged defects may have been immaterial and not such as would avoid or effect the election or return.

6. As to the 6th and 7th paragraphs of said petition they contain no charge within the law or statutes relating to elections, and there is no certain legal sufficient statement of any complaint. And it is not stated that the alleged acts were done to procure Respondents' election or return, and it does not appear that the objections to said votes were made at the proper time.

7. As to the 8th, 9th and 10th paragraphs, they contain no certain legal or sufficient statement of any complaint, and no undue return is thereby shewn, and the votes complained of are not stated to have been objected to at the time. And it is not stated that any oath was tendered to said voters.

8. As to the 11th, 12th, 13th, 14th, 15th, 16th and 17th paragraphs of said petition, they contain no legal or statutable complaint set forth, and the alleged grievances therein are not sufficiently described, and there is no statement that the things therein alleged to have been done were used to procure the election of said Respondents, or either of them.

9. As to the 18th paragraph of said petition it contains no charge or complaint sufficiently or with legal certainty set forth, and it does not shew, even assuming the alleged votes were illegally rejected, that they would be sufficient to disturb said election or return.

10. As to the 19th paragraph there is no ground or complaint legally set forth, and it is not alleged that the things complained of were done or used to procure the election of said Respondents, or either of them.

11. As to the 20th paragraph of said petition the acts of the Returning Officer therein alleged were according to law, and there was not and is not any scrutiny provided for by law or such as is contended for.

12. As to the 21st and 22nd paragraphs of said petition the charge therein is argumentative and is not sufficiently set forth and does not shew an undue return, and there is not set forth therein anything to shew that the proper and legal objections were taken, and the said complaint is too general, and is not a sufficient notice as is required in a complaint of an undue return.

13. And as to the prayer of said petition, while it is prayed that

the said election be declared void, it is not prayed that the said return be declared void.

14. There is no proper service or return of said petition.

Halifax, 25th March, A.D. 1874.

(Signed.) WALLACE GRAHAM,
Attorney and Agent of the above-named Respondent.

To the Petitioner above named.

The argument on the above objections were conducted by Hon. James McDonald, Q.C., and W. A. Johnston, Esq., Q.C., on behalf of the Petitioner, and by Robert L. Weatherbe, Esq., on behalf of Respondents.

The Court now (August 17) delivered judgment:

HON. W. A. HENRY:—The Petition in this case sets out in twenty-two paragraphs, sundry illegal acts and corrupt practices against the Respondents and others at the election, and complains or irregular and illegal acts on the part of the Returning Officer and his Deputies, and of the refusal of the Returning Officer to hold a scrutiny of votes which it is alleged was demanded of him at the close of the election,—and claims a seat.

The petition is headed "In the Election Court," "the Controverted Election Act, 1873," "Election for the County of Pictou, holden on the 4th day of February, in the year of Our Lord One Thousand Eight Hundred and Seventy-four," and the first clause sets out that the "Petitioner was a candidate at the above election," and claims "that he ought to have been returned, etc." Preliminary objections to the number of fourteen have been filed and argued before this Court, and for those, or some of them, we are asked to set aside the petition as insufficient. In deciding as to the nature and effect of such preliminary objections when raised, not before the judge on the trial, but addressed to the whole Court, I felt, and still feel, the want of any precedent to guide us. The English statutes provide for the decision of such objections by the judge before whom the trial takes place, and we therefore look in vain in that direction for aid in the decision of the points of objection to a petition that should form the subject of consideration for this Court or for the Judge on the trial.

"The Controverted Elections Act, 1873" makes the first provision known to me for the decision of such preliminary objec-

tions by a Court such as this, and, being from the short period since elapsed, without the assistance of any decisions under the new system in the other Provinces under that act, we can only deal with the several questions arising before us by a comparison of the duties performed in this Country and in England by committees of the several representative assemblies, and by Judges in the latter, with those required to be performed by this Court, and the Judges thereof at the trials, and as far as possible to appreciate and carry out the object and intention of the Act under which we are here placed. Our authority to deal with "preliminary objections" is derived from the fourteenth section of the Act before mentioned, under which, in the language of that section, "the Respondent may present in writing any preliminary objections or grounds of insufficiency which he may have to urge against the petition or against any further proceedings thereon," and this Court, or any Judge thereof, "shall thereupon hear the parties upon such objections and grounds, and shall decide the same in a summary manner." As I have already said, we have nothing in the shape of precedents to aid us as to the *nature* and *character* of the "preliminary objections," proper for the peculiar consideration and decision of this Court, but no question has been raised as to our jurisdiction in relation to any of the points involved, and it therefore seems unnecessary for me to discriminate as between those who should be dealt with by the Court and those which would come more legitimately before the Judge on the trial. I shall therefore proceed to dispose of the whole of the objections raised, and as the petition contains no less than twenty paragraphs, each alleging a distinct ground of complaint, and the objections number fourteen, I must endeavor to group some of both to avoid unnecessary prolixity.

The first and second objections are made to the general insufficiency of the petition. In the first it is objected that the petition "differs materially in form and substance from the requirements of Chapter 28 of the Acts of 1873, of the Canadian Parliament and the rules made thereunder and the other acts and the law in that behalf and is wholly insufficient." In the second it is objected "that it does not appear by the said petition or any part thereof that the same is made in relation to anything done in the Dominion of Canada, or in what part or Province thereof, or that the Petitioner resides in the Dominion of Canada, or in what part or Province thereof, or that the same contains any complaint within the scope of jurisdiction of the said Act or any Act of the Parliament of Canada, or that the election complained of was held within the Dominion of Canada, or any or what part or Province thereof."

The first objection is certainly too general, on the principle of

pleading that requires *some* notice to be given to the opposite party of the *grounds* of objection, and for all practical purposes might have contained no other allegation that the concluding words, "and is wholly insufficient;" for the preceding allegation, that it (the petition) differs materially in form and substance, &c., points with no more certainty to the nature of any alleged defect. Chapter 28, referred to, says, "a petition need not be in any particular form, but must complain of the undue election or return of a member, &c.," and our rules not only do not, but therefore could not, require any particular form. The petition is obviously as to *substance* within the requirements of both. It states the "holding and result of the election" and sets out the right of the Petitioner to petition as a Candidate, complains that the Respondents were "unduly elected and unduly returned," and claims that he (the Petitioner) had a right to have been returned at the election in question, and concludes with the prayer, "that it may be determined that the election of the sitting members, or one of them is null and void and that they or one of them were or was not duly elected or returned," and that the Petitioner, "was duly elected and ought to have been or should be returned." Thus, in my estimation, the requirements of the Statutes and rules have been fully satisfied.

The second objection, although apparently of a substantial, is still rather more of a technical character, and as such not to be much encouraged, nor allowed if possible, to prevail. One of our rules, (67), prescribes that "no proceeding under the Controverted Elections Act 1873, shall be defeated by any formal objection." The *substance* of the objection is evidently for the absence of such words as "Province of Nova Scotia and Dominion of Canada," following the word "Pictou," in the statement of the place where the election was alleged to have been held, at the head of the petition; and the absence of an allegation that the election was "for members of the House of Commons of Canada." It was argued in favor of the objection that the same strictness should be exacted in a petition charging, amongst other things, bribery and corruption, as in an indictment, but this proposition I cannot subscribe to. The object of strictness in criminal cases is not only to give the accused reasonable certainty as to the crime charged, but to describe it in such a way as to enable him successfully at a future time to plead, either an acquittal or a conviction. No such reason as the latter exists in election cases such as we are now discussing; for the time is long past for making another complaint, and as to the Respondents the decision of the Judge who tries them is final and conclusive. The objection to the petition on the ground of its being defective

as a notice of the particular election complained of I must under the circumstances view as groundless, for reasons which will hereafter appear. The Respondents know that they represent the County of Pictou in the House of Commons of Canada,—they know what County of Pictou is meant,—they know *that* County of Pictou to be in Nova Scotia and that the latter is a part of the Dominion of Canada. The petition is filed in the Election Court and is headed, "The Controverted Elections Act 1873." This Court has no power over any election, except in cases under that Act, and if Respondents hold a position other than one which comes to be affected by our decision under that Act, it would form a substantial defence. That such is not the case is admitted by the peculiar objections taken. I think therefore that they are not in a position to complain of any want of notice as to the election meant to be contested. Does the petition therefore, in other respects allege what is substantially sufficient? I am of the opinion that it does. It states the election to have been held in the County of Pictou,—and this and other Courts are bound to take judicial notice not only of public statutes but of divers other public matters. "Courts also notice the territorial extent of the jurisdiction and sovereignty exercised *de facto* by their own government and the local divisions of their country,—such as states, provinces, counties, counties of cities, towns, parishes and the like, so far as political government is concerned or affected, but not the relative positions of such local divisions, nor their precise boundaries further than may be described in public statutes." 1 *Taylor on Evidence*, sec. 15. * * * And "the stated days of general political contests, * * * the date and place of the sittings, of the Legislature and in short to borrow the language of the Vice-Chancellor in *Taylor vs. Barclay*, "all public matters which affect the government of the country." *Ibid. sec.* 16. BAYLEY, Justice, says:—"It is quite true that this Court will take judicial notice of the general division of the Kingdom into counties, because they are continually in the habit of directing their process to the Sheriffs of those Counties and because they are mentioned in a great variety of statutes." BEST, J., in the same case says:—"We ought, it is true, to take judicial notice of the counties in England and of those which are Maritime Counties as being mentioned in a variety of Acts of Parliament." HOLROYD, J., in the same case, who seems to admit this proposition, says, "still the Court cannot take judicial notice of the local situation of Orfordness." *Doybell's case*, 4 *B. and Ald.* 246. By reference to all the statutes now, and at the time of the election, in force, we find but one County of Pictou in the Dominion of Canada. That County we know from other legal sources as well as the election statutes, to be in Nova Scotia and by the name of the County of Pictou,

an electoral division for representation in the House of Commons of Canada. (See section 40 British North America Act 1867, "Each of the eighteen counties of Nova Scotia shall be an electoral district. The County of Halifax shall be entitled to return two *and each of the other counties* one member.") And by the same legal principles and evidence we are bound to know that Nova Scotia is in the Dominion of Canada. I think therefore that the County of Pictou must be taken to mean an electoral district for members for the House of Commons. And as to the objection, that the election in question was not alleged directly, in so many words, to have been "for members for the House of Commons," I think the answer may be also fairly given that in the fifth and seventh paragraphs of the petition, references are made to the "alphabetical list of the electors of the said County of Pictou qualified to vote at the election of members to serve *in the House of Commons of Canada,* as provided by the tenth section of chapter 27 of the Acts of the Parliament of Canada for 1873," and a complaint is set forth therein that the legal list was not used at that *election,* but an illegal one, and that votes of persons, "guilty of corrupt practices * * * within the meaning of the Controverted Elections Act of 1873," were given for the Respondents at that election.

I do not consider it necessary that we should do more than look at the petition as a whole; and if the election complained of is referred to in such general terms as would leave no reason for doubt in the mind of any one sufficiently instructed in the legislation upon the subject, I think I am bound to consider it sufficient, and therefore to conclude against that objection. As to this point, much stress was laid on a dictum in the *Windsor case.* (10 *H.* 6) that this was a "quasi criminal proceeding." But what the distinguished Judge in that case said, was not applicable to the general allegations in a petition, or as characterizing what strictness in that respect should be required, but as to the evidence necessary to sustain a charge of corrupt practices. This is the only piece of apparent sanction to be found in the modern cases, and it certainly does not apply to the objection in this case. As a set off to any effect likely to be produced by a reference to the high authority in question, on the point to which his remark properly applies, we may safely refer, as more applicable, to what fell from BARON MARTIN in the *Norwich case,* 10 *H.* 9; "I will not," he says, "study the wording of the petition but its substance." On the next page he is reported as saying, "If I were sitting here to try an Indictment or an action for a penalty, before the candidate could be made responsible for another, for a crime or penalty, you would have to give evidence of direct bribery, but I am not trying a criminal case,

I am trying a civil case, and the rules applicable to a civil case, are the rules applicable, I apprehend, to this." The same doctrine is laid down by all the judges for the last six years in England, and I am quite content to be governed by the decisions of such judges. Besides, under the law, this Court has been clothed with the same "powers, jurisdiction and authority as one of the Superior Courts of Law would have in any civil case or criminal case pending before it," and this Court is made a Court of Record (see section 36, "Controverted Elections Act 1873.") It has therefore I conceive the power of granting amendments, and to avoid the effect of a mere technical objection. I should feel myself not only justified in allowing, but bound to allow, an amendment, but possibly not such a one as would constitute a new charge, which might affect the operation of the limitation of the time for petitioning, although in a late case Pickering vs. Starten (*L.T.*, "*Notes of the Week*, *Jany.* 1872") an amendment was allowed upon grounds not merely technical but making substantial additions to the petition.

The objection as to the residence of the Petitioner is already answered; if an answer were required. He describes himself as "of Pictou in the County of Pictou," and *that*, for the reasons before given, I consider quite sufficient. Besides, his *residence* either at the time of the election, or as a Petitioner, forms necessarily no part of this enquiry, as to the merits of his petition. His residence may have been, at both dates, in a foreign country; and such residence would not affect his right to be returned, or to petition.

I have thus gone more into detail on the points noted than may be considered necessary; but I thought it right to do so, in this my first judgment, hoping that it may tend to render discussion upon them unnecessary in the other cases for decision.

The third objection I consider quite too general for the reasons given when dealing with the first, but if not so, I think the grounds insufficient, as will hereafter appear. The fourth objection I consider incapable of being sustained. The complaint is, "that it is not stated that the alleged illegal votes were counted for the Respondent," but the words used are that those votes "were recorded for and on behalf of the said James William Carmichael and John Adam Dawson,"—and I cannot conceive how better words could be used for such a purpose. Further, it is objected that it is not shown "that they were not struck off." This would be unnecessarily negativing before-hand what may be alleged and shown as a matter

of defence. Again, as to the ground that the objections were not stated "to have been made at the proper time;" as a substantial allegation in an election petition,—I think it is sufficient to allege the facts generally, which go to show an irregularity in receiving and recording votes; and that the words, "notwithstanding the same were objected to by and on behalf of Petitioner" should be in the first place construed to mean, *at the proper time*, and then it will become a question to be decided by subsequent proof. The complaint in the paragraph objected to is not I think so much against the votes, the validity of which may be separately attacked on a scrutiny, (although such are included in it) as for the allowance, bythe Returning Officer, of numbers to vote when not included in what the Petitioner claims to have been the *right list*, notwithstanding their names were on the list by which the election was held. If that be the position assumed and proved, I am of the opinion that the votes under the circumstances would be bad independently of any objection made, or not made at the time.

The fifth objection is that the fifth paragraph does not show that the Petitioner, "objected or did not waive any claim," and "that the alleged defects as far as appears may have been immaterial, &c." The paragraph in question I consider sufficiently full and at the same time explicit. It in effect, complaints that at the election an illegal list was used; and if that be proved, no objection at the time was required; nor is it necessary to negative a presumption of the waiver, by Petitioner, of his right to the employment of the legal list, and the effect of using a totally illegal list cannot be measured or legally inquired into.

The first part of the sixth objection is too general; and the concluding part of it I think cannot be sustained, viz., the absence of any allegation "that the acts were done to procure Respondents' election or return, and that the objections are not alleged to have been taken at the proper time." It was argued strenuously by the Council of the Respondents', that because the words "to procure his election" are found in the 18th section of chapter 27 of the Dominion Act 1873, preceding "his election shall be thereby (by the proper tribunal) declared void," the power of a judge of this Court to declare an election void for bribery or other corrupt practices is derived wholly from that section, and that because it was neces-

sary to constitute bribery or other corrupt practices for which an election may be avoided that it must be *proved* to be "to procure his election," the allegation charging a Respondent in terms with bribery, &c., must allege in the petition that such bribery, &c., was used "to procure his election." I cannot agree with the objector in this contention. The section begins by prohibiting "any candidate at any election, directly or indirectly," from employing any means of corruption "by giving money, office emolument, &c., or by himself or his authorized agent," threatening the loss of office, &c., "*with intent to corrupt or bribe* any elector to vote or to keep back from voting," and "from opening, &c., at his costs and charges, any house of entertainment, &c.," and then provides that "if any representative returned to the House of Commons is *proved* guilty before the proper tribunal of using any of the above means to procure his election, his election shall be declared void, &c." We must not, I think, complicate the matter by mistaking the *offences* in the first part of the section for the *penalties* in the concluding clause, which, so far as avoiding the seat is concerned, does not substantially affect what is the Law without it. Bribery, intimidation, treating, personation, &c., are terms well known to the Law, and carry with them, when used, a clear intimation of the several offences at elections intended to be charged; and the word "bribery," used in an election petition, is construed independently of any statute, to be the giving of money, or something else *with intent to corrupt or bribe* an elector. It also, when so used is by the common law applicable to persons who have received a reward for voting, &c. Bribery is also described by Cap. 4, of the Revised Statutes of Nova Scotia, 3rd Series, but it is objected that the Act is impliedly repealed by Chapter 27 of the Dominion Acts 1873. This, to my mind, is doubtful; but we need not take time to discuss that question, as, independently of the definition referred to in Cap. 4 R.S., we can find sufficient authority otherwise to sustain, in this respect, the paragraphs in the petition. Sec. 18, before mentioned, has these words, to "corrupt or bribe him to vote, &c." Now, paragraph six complains that "the votes of bribers, and those bribed," were recorded at that election, for Respondents; but the Statute does not provide for striking off such votes. Are such votes then to remain good because Sec. 18 is silent as to them? Let us see from undoubted authorities how the common law disposes of them, and I here refer to votes bribed without the knowledge of the candidate or his agents. After speaking of undue influence and the evidence to avoid an election

at common law, BARON MARTIN, in the *Bradford case*, 1 *O. and H.* 40, says (and his views are identical with those of all the other Judges), "Amongst these influences there are what are called bribery, treating, and oppression, that is an undue pressure put on a man." And subsequently he says in respect of a vote given under such influence, "But that affects the man alone; it does not affect the candidate; it has merely the effect of extinguishing the vote; and if there was a scrutiny for the purpose of ascertaining who had the majority of votes, that man's vote ought to be struck off." The Petitioner, in the two paragraphs mentioned, complains that bribed votes of both classes "were counted against him"; and, in paragraph 22, alleges "that he had a larger number of legal votes than were polled for the Respondents, or one of them." Before the enquiry ends there may be a scrutiny; and should he be able to reduce the majority of either of the Respondents by the proof of bribery so as to give him a majority of legal votes, I have no doubt that under the common law he is entitled to do so. A question may, however, be raised as to the force in this country, of the common law, or the parliamentary law of England, in regard to elections. The Legislatures of the several provinces, now composing the Dominion of Canada, and the Dominion Legislature, by the enactment of statutes, have already dealt with the subject; but so far as I can learn, however, the laws and practice of Parliament regarding the trial of contested elections have nevertheless almost invariably been acted on; and in the absence of Provincial legislation in respect of any matter in connexion therewith, Parliamentary Committees have generally felt bound by the laws and practice referred to. Sec. 32 of "the Controverted Elections Act, 1873," seems to me, however, to settle all contests on that point. "Until rules of Court have been made by the Judges of any Election Court in pursuance of this Act, *and so far as such rules do not extend*, the principles, practice and rules on which election petitions, touching the election of members of the House of Commons in England, *are at the time* of the passing of this Act dealt with, shall be observed, so far as consistently with this Act, they may be observed by such Election Court or a Judge thereof." By the practice of the Judges in England in 1873, (when the Act was passed), such votes as were obtained by bribery,

&c., independently of the candidate or his agents, were struck off on a scrutiny; and I think that under the terms of the section first quoted we would be bound to follow that practice here. Such being the case, I think the two paragraphs in question are at all events available as the ground work for the necessary enquiry for the purpose I have mentioned.

The seventh objection is to the 8th, 9th, and 10th paragraphs of the petition. They allege in substance that "the votes of divers persons not entitled to vote, &c., were tendered, and recorded for the Respondents at said election, notwithstanding the same were objected to by, and on behalf of Petitioner." The first two paragraphs assign no reason why the votes were bad, and none of the three paragraphs alleges, that the votes were *illegally* received, and recorded by the returning officers. No fraud or misconduct is alleged against the officers, and as the cases if any were enquired into, could only under the allegations, be a subject for scrutiny, and not for otherwise avoiding the election, I consider the charges defectively stated. There ought to have been such a statement as would show, on the face of the charge, cases of *illegally recorded votes* against Petitioner. It is quite possible some of the votes referred to *may be bad,* some for one cause, and some for others, but whatever the cause is, it should be alleged, if for nothing else, as a notice to the Respondent. None is stated in paragraphs 8 and 9, and in 10, the only reason given, is that the voters in question "received aid as paupers." Such votes, though "illegal," may not still be capable of being scrutinized, through the fault or negligence, it may be, of the Petitioner or his agents. If the oath, prescribed in such cases, was not tendered; or, at all events, if the votes were not marked "objected" on the poll book, they could not, under the acts in force, be subjected to scrutiny; and relief in that way being the only available one, I think the Petitioner on the face of his petition should have shewn by statements of facts, a case that would legally entitle him, through a scrutiny, to have such votes expunged. The lists finally made by the Revisors in Nova Scotia appear to be conclusive as to the qualification of the electors, there being no review of their decision, as there is in England, of that of the Revising bar-

rister, and therefore I think it would be only for cause of disqualification arising after the lists were made up, that a judge here could scrutinize. The paragraphs in question give no sufficient intimation of the nature of the disqualifications nor do they shew why the votes were bad; and I therefore feel bound to conclude against them, and think the objection to the three clauses in question should prevail.

The 8th objection is to paragraphs from 11 to 17, both inclusive, on the ground that "they contain no legal or statutable complaint, "that the grievances therein are not sufficiently described, and "that there is no statement that the things therein alleged to "have been done were to procure the election of Respond-"ents, or either of them." Paragraph 11 (and the decision as to it will affect the others,) alleges "bribery" on the part of "the Respondents, their servants and agents," and the "employing of means of corruption with intent to bribe certain "electors to vote for Respondents at such election, &c." The first part of this charge, ("the bribery",) is I think sufficiently charged at Common Law, and even within the terms of section 18 before quoted; but the mere charge, by the use of the word "bribery" under the Common Law definition is alone sufficient. Mr. JUSTICE WILLES, in the *Litchfield case* (1,*O. and H.* 29) says, "Bribery at "Common Law is a misdemeanor, and is commited whenever a vote "is procured from, or disposed of, by an elector, for a valuable con-"sideration, both parties to the transaction agreeing in that intent." And further, "But it has been long held, before these Acts of Par-"liament passed at all, that by the Common Law of the land—"that is law not created by the enactments of Parliament—bribery, "undue influence and undue pressure vitiate an election;" and at page 26 of the report of the same case, he says—"with respect to "bribery the law is perfectly clear. Bribery at Common Law "equally as by an Act of Parliament avoided an election at which "it occurred." In the *Beverley case* (1, *O. and H.* 147) BARON MARTIN says—"a man giving a vote for a member of Parliament "under what the law deems undue influence gives no vote at all. "This is the common law. It depends upon no statute and it is a

"consequence that if the judge is satisfied that the votes of a con-"siderable number of persons were corrupted and bribed, however "innocent the Candidates may be, and though himself unconnected "with the corrupt practices, his election is void by reason of the "incapacity of the voters, because of the general corruption, to give "valid and effective votes." I must now proceed to consider the effect at common law of bribery at the election complained of, by the successful Candidates themselves or by their Agents. In *Bushby's practice of election 4th Ed. by Hardcastle* 1874, at page 111, it is shown that as regards the other consequences of common law bribery, they are transferred from the House of Commons to the Law Courts but that "the old principles, practice and rules observed by Parlia-"mentary Committees are still important and binding," and to this Court equally important and binding under the Act establishing it, and I find these important declarations sustained by the cases I before referred to. The Editor further says:—"Now one consequence in Parliament of Common Law Bribery, when committed by a duly qualified and successful Candidate at an election, was to enable the House and it exclusively, (*May's Parl: Practice* 7 *Ed. p.* 56) to annul his return and that though only a single bribe was proved." "Although the votes so procured were void, and even if after deduct-"ing them he still had a majority in his favor the result was "the same"—"*Simeon* 166, 2 *Doug.* 404, *n B.*" "This was intended "not so much as a penalty (*per Willes in Letchfield case* 1,*O. and H.* "26) as to secure to constituents a free and incorrupt choice; see-"ing that a single purchased vote brought home to a Candidate, "might well throw doubt on his whole majority." With such high authorities for my guidance, I feel bound to declare that when a charge of bribery or intimidation is made to the Court it is not necessary, in order to avoid the election of a successful Candidate, to allege any merely statutable offence, or to describe the offence any further than to charge bribery or intimidation, &c., generally; and that it is not necessary that the complaint should allege the bribery, &c., to have been used "to procure the election" complained of. Even by the strictness of the criminal law, the objection I think is untenable. An offence at Common Law is often made by statute of a more serious character if committed with an intent

more malignant or malicious than would, by the Common Law, be imputed to it. To convict for the minor offence no intent is necessary to be alleged. Bribery is a complete offence without reference to the intent. The only "intent" mentioned in the section is to *corrupt or bribe*, and that intent is alleged. One clause of a statute creates an offence to be charged in an indictment, and in another provides for the punishment, and we may I think read the different clauses in Sec. 18 Cap. 27, D. Acts 1873, in the light of the principles of the Criminal Law, and with regard to some of the prohibited Acts the only intent mentioned is that "to corrupt or bribe, &c." If therefore, the Candidate use any of the prohibited means "to corrupt or bribe" at the election, the offence is completed and the consequences or penalties stated in the last part of the section thereupon arise and are incurred. The words, "proved guilty before the proper tribunal," do not in my judgment affect the *nature* or *degree* of the offence, but are used simply to declare the legal consequences of the finding of the party "guilty" by the "proper tribunal." The decision as to the eleventh paragraph settles as far as my judgment can affect them all the objections to the next five paragraphs of the petition and I need not therefore further refer to them.

Objection 9 to the 18th paragraph of the petition is I think not well taken. The complaint is in substance that the Returning Officers illegally refused to receive, in favor of Petitioner, qualified votes tendered for him. This in connection with paragraph 22 I consider sufficient; and I have no doubt of the right and power of a Judge on a Scrutiny to add qualified votes if "illegally" rejected and to determine on such an enquiry, which of the contesting parties had or ought to have had the majority of legal votes. If no power existed of reviewing the acts of the Presiding Officers at the Polls, and there is none outside of this Court, all law might be set at defiance, rights trampled on, and the grossest injustice done not only to a Candidate, but to the legal majority of a constituency, and if high-handed violation of law, or partiality, were shown and legal voters systematically excluded, I don't think a Judge would hesitate to avoid an election on that ground without waiting even to ascertain by strict evidence whether the number proved to have been so

excluded, would or would not affect the majority. I therefore consider the charge in that paragraph to be one depending on proof before the Judge, and not one against which a preliminary objection can be urged.

The tenth objection to the 19th paragraph I consider also untenable. The complaint in that paragraph is set out in the words of the prohibitory part of section (18 *cap.* 27) to which no intent or motive is added. It is simply prohibitory, and the consequences are settled by the latter part of the section. It is the "intent" which makes what would otherwise be legal acts as set out in the first part of the section illegal; but not so the "keeping of open a house of entertainment, &c." The statute in the latter case altogether disregards the intent; as, doing the prohibited act during an election, is presumed to admit of but one construction, and that necessarily is that the doing of the act mentioned could be only "to procure his election."

It is hardly necessary to decide upon objection 11 which is to the 20th paragraph. It complains of the refusal of the Returning Officer to grant the Petitioner a scrutiny of the Respondents' votes under "Cap. 8 of the R.S., 2nd series." That chapter appears however to have been repealed by the Act of 1863 and by the Act of 1864 to have been revived; but only as "to elections held before the "twenty-fourth day of June, 1865," which are provided to be held under the provisions of "Chapters 5, 7 and 8, and all Acts in amend-"ment thereof. Anything contained in the Act passed in 1863, en-"titled 'an Act to regulate the election of members to serve in the "General Assembly' to the contrary notwithstanding." When by one Act another is repealed the repeal of the former will not revive the latter, (see R.S., 3rd series, page 2) and as Cap. 8 R.S., 2nd series was revived by the Act of 1864 to operate only up to June, 1865, I think it doubtful that it was any longer in force, and consequently that no scrutiny could be held under it. As I have shown, however, in a former part of this judgment that a scrutiny of votes is within the powers of a Judge of this Court, it matters little I think how this point is now decided.

The 12th objection to the 21st and 22nd paragraphs is next to be considered. The paragraphs referred to do not set out any charge but merely allege what the Petitioner claims as the result and consequences of the illegal acts complained of in the preceding paragraphs; and as such have not in my opinion in themselves the elements for a "preliminary objection."

This objection is to the prayer of the petition for not asking to have the *return* avoided as well as the election. The statute allows the petition to be for either; and I think the prayer here is the only one applicable to the case as set out in the petition. An application complaining of an undue "return" may be successful; and the petitioner seated; but in such a case, by the practice of Parliament, the unseated candidate may subsequently petition, complaining of the undue "election" of his, whilom, successful opponent; and by proof of his petition not only unseat him but obtain the seat himself again. A prayer to avoid an "undue return" would I think in this case be wholly inapplicable and useless.

The last objection was not argued or relied on at the argument, and must therefore have been considered unavailable and consequently abandoned. The conclusions we have arrived at may be embodied in a rule, and, adopting the course of the Judges in England as to costs, we will reserve the decision as to them until the final adjudication takes place.

ALEX. JAMES, ESQ., Q.C.:—I concur generally in the judgment of Mr. Henry, except as to the counts which he considers not sufficient. The forms given in the rules is not at all binding on a Petitioner. He may adopt it or not at his pleasure, but of course at his own risk. The rules merely say that the form given shall be sufficient, and it is wiser and better to adopt it unless there is good reason for departing from it. I think we should in these cases view any departures from the form given with indulgence as the rules were adopted so short a time before the filing of the petitions, that they were probably not seen by the gentlemen who prepared the petition in time to be of service. I had some difficulty about

the caption of the petition. It is exceedingly defective when compared with the form, but we can I think from scraps here and there in the petition, gather that the election was to return members for the House of Commons of the Dominion of Canada, and that it was for the County of Pictou, in the Province of Nova Scotia.

It is established in *Deybell's case*, cited by Mr. Henry, that the Court can take judicial notice of the division of the country into Counties. The British North America Act, gives a member to the County of Pictou in this Province, and the Act for the redistribution of seats gives two members to the same County. Here it is headed in the County of Pictou, but does not mention the Province or the Dominion, except incidentally in other places. But all our Common Law proceedings, and even criminal proceedings are headed in the same way. It is true that this is regulated by statute, but that does not affect the argument. Some of our Counties have the same names as English Counties, but our Courts, although the Province is not stated, take judicial notice that the proceedings relate to the Counties in this Province, and not to the English Counties.

The concluding prayer I think is quite sufficient. With respect to the body of the petition we have no prescribed form, and I do not think we have any guide in Common Law proceedings. So far from an election petition being held to the strictness of criminal proceedings, the practice which regulates them is even less stringent, than that regulating civil proceedings in the Common Law Courts. I can find no single instance in all the cases that have been decided of a petition being set aside for want of form, and our rule No. 67 says, that no proceedings under the Act shall be defeated by any formal objection, which I consider this to be. The principal point in an election petition is that it expresses clearly the objection complained of, and what is demanded. If it does this, however informally, I think it sufficient.

Besides charging bribery and other corrupt practices against the Respondents, this petition sets out in separate paragraphs, certain

classes of votes which are alleged to have been improperly received—for instance, persons guilty of corrupt practice and persons receiving aid as paupers, and in two clauses, 8 and 9, it complains of voters being received who were not qualified without stating for what cause they were disqualified. I had some doubt about these paragraphs until I referred to the English form in *Wolferstanc, Appendix, page* XLIII., where a specimen is given of the petitions used in England, which accords in these respects with the sections I have referred to. And in *Wolferstanc, Appendix, page* XXXVII. a specimen of particulars is given not more precise. It is true that these clauses do not, like those in the English petition, allege in each clause that the votes should be struck off the poll, but his is done in two separate paragraphs at the end of the petition where it is stated that the petitioner had, owing to the reception of such illegal votes, more good votes than the Respondents, and praying that the bad votes may be struck off and the Petitioner declared elected. I think this quite sufficient.

In my judgment the petition as a whole ought to be sustained and the preliminary objections dismissed, and it should be left to the Judge at the trial to refuse to receive evidence on any of the clauses which he may, after fuller consideration and perhaps further argument, consider defective. I think it a very good reason for leaving all questions open to the judge is that we are daily expecting to receive the decisions of the Judges in the Upper Provinces, and in this way, before the trials, we may have light which we do not now possess.

JAMES W. JOHNSTON, ESQ., Q.C.:—The first objection alleged against the petition is that is differs materially in form and substance from the requirements of the statute, and the rules made thereunder, and the grounds on which such objections are based, are that it does not appear by the petition, or any part thereof, that the same is made in relation to any thing done in the Dominion of Canada—*or in what part or Province thereof,* or that the Petitioner resides in the Dominion of Canada, or in what part or Province thereof.

The petition is headed "In the Election Court. The Controverted Election Act 1873. Election for the County of Pictou, holden on 5th day of February, &c., the petition of Robert Doull, of Pictou, &c."

One of the rules framed and promulgated by this Court (the 6th) gives the form of a petition, which, or one to the like effect, shall be sufficient. The petition under consideration differs materially from the form given, but I am not disposed to insist upon a too close resemblance, inasmuch as the rules were not adopted until the 13th March last, the day when the petition bears date, and were signed by the Judges on the day following, the same day that the petition was fyled with the Clerk of the Court; and the Petitioner may therefore be fairly presumed to have had no notice of the existence of such rules at the time he signed the petition; in addition to which the rules themselves possibly required the authentication of the signature of the Judges to give them the force of law. Leaving the rules then out of consideration, as effecting one way or the other the petition before us, we are called upon to decide whether that document affords the requisite information, and meets the requirements of the Act.

This Court is a creature of the statute; we derive all our powers from Cap. 28, 1873, and every case must be brought clearly and unequivocally within the statute before we have jurisdiction over it or are entitled to deal with it.

I apprehend that the correct rule by which we must be governed in adjudicating upon these election petitions, is that laid down by Mr. Justice Maule in *Thorne vs. Jackson*, 3 *C. B.* 661, in regard to affidavits, when he said "we must not by inference or implication supply facts which ought to be distinctly and positively alleged."

The petition is headed, "In the Election Court." But what Election Court? Sec. 2 of Cap. 28 interprets the expression Election Court for the purposes of that Act, and declares that "the Election Court" for the Dominion or for the Province, or place in which the election in question was held, shall be understood as in-

tended when "Election Court" is mentioned, but supposing we admit that Election Court in the petition has the same meaning as in the Act, still we have no information afforded whether it is the Election Court for the Dominion or for the Province, or place in which the election in question was held, that it meant, and the jurisdiction of this Court is confined to the Province of Nova Scotia, and this Court has no concern with anything occurring beyond its borders. Cap. 28 is for all purposes to be cited as "the Controverted Election Act 1873," and that Act is for the purpose "of making better provision respecting election petitions, and matters relating to Controverted Elections of members to the House of Commons," and therefore I think that this Court is bound to notice,—that Act having been refered to,—that the petition has reference to an election for the House of Commons somewhere in the Dominion, although, as I shall presently show, the use of the expression "County of Pictou" is calculated to cast no little doubt on the point. I think upon the whole that it will be safer to hold that that part of the Respondents' objection, that it does not appear that the petition has reference to any thing done in the Dominion of Canada, is not tenable, the Act having been mentioned. But in what part of the Dominion? The petition is silent. Was the election held in any part of it, where this Court or the branch of the Court has jurisdiction? The question cannot be answered without going outside of the petition. Surely on a point so important as this we ought not to be kept in ignorance or left to grope our way towards the light as best we can.

Again, there is no division into counties in respect of the election of members for the House of Commons. The 40th section of the British North America Act enacts that "until the Parliament of Canada otherwise provides Ontario, Quebec, Nova Scotia and New Brunswick, shall, for the purpose of the election of members to serve in the House of Commons, be divided into electoral districts," and, by sub-section 3, each of the eighteen counties of Nova Scotia shall be an electoral district; and in one of the Provinces of the Dominion, at least, the electoral district is made up of parts of counties, while in Nova Scotia the bounds of the counties form the bounds of the several electoral districts. Cap. 28 refers to the electoral districts

and never once to the counties. The same occurs in our rules where, save in the one instance of notices of trial, and that an oversight the electoral district is named and not the county; and yet, strange to say, the petition has no mention of the electoral district, but characterizes it as an election of the county of Pictou; and I fail to perceive how the Petitioner can expect this Court to entertain a petition in which on so important a point he has not followed the law, or by what right he assumes to substitute the county of Pictou for the electoral district. But there is another difficulty to be met. What is the locality of the county of Pictou? Where is it situate? In the Dominion of Canada? If so, in what Province? Is it in Nova Scotia or any of the other Provinces? Where can we derive this knowledge? Certainly not from the petition, for in no part is the information afforded. In *Deybell's case* 4 *B. and Ald.* 246, BAYLEY, J., expressly stated, "that the Court would not extend the judicial notice they took of the division of the kingdom into counties, to the particular part of counties and their local situation"; and HOLROYD, J. said, "this Court cannot take judicial notice of the local situation of Orfordness." See also *Bruce vs. Thompson*, 29 *B.* 791, where the Court refused to take judicial notice that the tower was in London. Also *P. W.——Rex. vs. Bumege and Thorne vs. Jackson* above referred to, where although the defendant described himself as of No. 57 Bedford Row, Holborn, in the county of Middlesex, the Court held that he had failed to show that he was resident within the jurisdiction of the Court of Requests for the Co. of Middlesex, for at the time the action was brought he might have resided in another part of Bedford Row, which may be in the city of London; adding, "for the Court in Kingsgate Street is the Court of Requests for that County (Middlesex)." Applying the principle of these cases to the matter before us, this Court cannot take judicial notice in what Province of the Dominion Pictou is located, or that it is situated within our jurisdiction, nor certainly can we notice that the electoral districts are the same as counties; and if we could, what then? Is this Court to go a step further and when the Act, which is our authority, divides the province into electoral districts, hold that electoral districts and counties are convertible terms, and that it is immaterial which is used. It was essential

that these facts should have been positively and distinctly alleged in the petition, and it would be a dangerous innovation to hold that defects, such as these, could be supplied from inferences or by implication. Section 10 prescribes by whom the petition is to be presented—it must be by some person duly qualified to vote or be a candidate at the election to which such petition relates. Now to what election does this petition refer? The heading of the petition affords no information,—is rather calculated to mislead, while the deficiency is not remedied, or the information supplied in any portion of it. The pleader says, where referring to the election, "as the election, the said election"; for these reasons I do not think that the above section of the Act has been complied with.

In my judgment, therefore, the petition is defective in the respects above adverted to, and therefore the preliminary objection must prevail. In arriving at this conclusion, I have not been unmindful of the dictum of BARON MARTIN in the *Norwich case*, 1 *O. and H.* 9, "that he would not study the words of the petition, but its substance, nor of our own 67th rule which provides that no proceedings under the "Controverted Election Act 1873" shall be defeated by any formal objection." No one is more reluctant than I to be tied up by technicalities. I appreciate that it is our duty to get at the pith and marrow of the petition; but cannot look on the objection as in any sense formal. What is left out is of the very essence of the matter; we cannot supply it, and without it we have no jurisdiction.

This petition and the proceedings thereunder will become a record to be produced before this Court or another tribunal, as occasion may require, and to be reported on by the Judge, who tries the petition, to the Speaker of the House of Commons; and the obligation rests on us to see that the ends of justice are not defeated by undue laxity on our part. The duty of the Court is to hold the scales equally balanced,—on the one hand not to allow the Respondent to escape the consequences of his act on any flimsy objection,—and on the other to take care that the Petitioner brings himself within the law before he invokes the powers of the Court to inflict such serious penalties on a representative.

In accordance with the judgment of the Court, an order passed in the following terms:—

On argument of the preliminary objections to the petition herein, it is ordered that the preliminary objections filed against paragraphs from one to seven, both inclusive, and from eleven to nineteen, both inclusive, and twenty-one and twenty-two be disallowed and overruled; that the eleventh objection to paragraph twenty of the petition be allowed and the said paragraph struck out, and that on paragraphs eight, nine and ten evidence be received before the Judge on trial as on a scrutiny only, and not as to matter, which would itself avoid the election; the question of costs for the present reserved.

Dated 19th August, 1874.

By the Court.

BENJAMIN RUSSELL,
Clerk of the Court.

HUGH CAMERON, Petitioner.

vs.

SAMUEL MeDONNELL Respondent.

Decision on preliminary objections. Question as to sufficiency of petition. Constitutionality and jurisdiction of the Court.

The petition in this case was filed in the following form:—

IN THE ELECTION COURT.

The Controverted Elections Act 1873.

Election of a member for the House of Commons for the County of Inverness, Nova Scotia, holden on the Fifth day of February, A.D. 1874.

Dominion of Canada,

Province of Nova Scotia.

The petition of Hugh Cameron of Mabou, in the County of Inverness, Nova Scotia, Doctor of Medicine, whose name is subscribed hereto.

Respectfully sheweth:

Your Petitioner Hugh Cameron, is a person who was duly qualified to vote at the above election and was a Candidate thereat.

And your Petitioner states that the election was holden on the Fifth day of February, A.D. 1874, when Samuel McDonnell, and your Petitioner were Candidates, and the Returning Officer has returned the said Samuel McDonnell, as being duly elected and the receipt of said return was published by the Clerk of the Crown in Chancery in the Canada Gazette of the date of the twenty-eighth day of February, A.D. 1874.

And your Petitioner says that no alphabetical list of the electors of the County of Inverness, qualified to vote at the election of members to serve in the House of Commons of Canada, as provided by the tenth section of chapter 27 of the Acts of Parliament of Canada for 1873, entitled "An Act to make temporary provision for the election of members to serve in the House of Commons," was ever prepared or filed with the Clerk of the Peace for the said County of Inverness.

That in the spring of 1873, a list of electors of the said County of Inverness, qualified to vote for members to serve in the House of Commons, was prepared in accordance with the laws in relation thereto, which were then in force in the Province of Nova Scotia, which list was duly filed with the Clerk of the Peace for said County

and was the regular and proper and only list of the electors of said County, qualified to vote at the said election.

That although said last mentioned list was not made up strictly in accordance with provisions of the said tenth section, it contained the names of all those electors who were qualified to vote at said election and none others, and if a list had been made up according to the provision of said tenth section, it would have contained precisely the same names as the list made up in the spring of 1873, as above mentioned.

That the Returning Officer of the County of Inverness, did not at the said election use the list so made in the spring of 1873, which was the proper and only list of electors of said County, qualified to vote thereat, but notwithstanding the remonstrances of your Petitioner he improperly and illegally used, a list of electors which was made up in 1872, and supplied copies thereof to his deputies, and at the said election hereinbefore mentioned those only of the electors of said County, whose names were entered on said list of 1872 were allowed to vote.

That in polling districts No. 11 and 18, the said Samuel McDonnell, received at the last election 318 votes, and the number of electors for those districts, according to the list of 1872 were 328, while according to the list prepared in 1873, which your Petitioner asserts is the legal and correct list, there are only 126 electors qualified to vote in those districts.

In polling district No. 4, where the said Samuel McDonnell, at the last election received 136 votes, and the list of 1872 gave the number of electors as 221, according to the legal and correct list made up in 1873 there are only 161 electors in the district.

That in the other districts there is also a great difference between the two lists, the list of 1872 showed 284 more qualified electors for said County that the list of 1873.

The majority of the said Samuel McDonnell over your Petitioner at said election was 121.

And your Petitioner lost said election in consequence of the illegal and improper conduct of the Returning Officer in using an irregular illegal and improper list of electors thereat.

Wherefore your Petitioner prays that it may be determined that the said Samuel McDonell was not duly elected and returned, and that the election was void.

(Signed.) HUGH CAMERON.

(Signed.) J. N. RITCHIE,
Plaintiff's Attorney.

The following preliminary objections were filed on behalf of the Respondent:—

IN THE ELECTION COURT.

The Controverted Elections Act, 1873.

Election of a member for the House of Commons for the County of Inverness.

Dominion of Canada,
Province of Nova Scotia,
To Wit :

Cause HUGH CAMERON, Petitioner,
vs.
SAMUEL MCDONNELL, Respondent.

1. The said Election Court has no jurisdiction in or about the matter alleged in said petition, and cannot take cognizance of the same or adjudicate thereon.

2. It is admitted in said petition that no alphabetical list of electors qualified to vote at elections of members to serve in the House of Commons of Canada was prepared according to law within three months after the passing of Chapter 28 of the Acts of 1873, for the Dominion of Canada, 36 Vict., and while in said petition it is admitted that the list made in 1873 was not made in accordance with law, and while no list was made under the first part of said section, it is not alleged that the list of 1872 first made and admitted in said petition to have been used at said election, was not in accordance with law or in accordance with the last part of Section 10 of said Chapter, and the other statutes in that case made and provided.

3. There is nothing stated in said petition to show that the Register of Electors used at said election was not such as is provided until the alphabetical list to be made within three months after the passing of Chapter 27 of the Acts of 1873 for the Dominion of Canada, 36 Victoria, or the lists thereafter to be made as in the 10th section thereof is provided, should be made and perfected.

4. Said petition does not complain of the undue election or return of the said Samuel McDonnell according to the provision of part 1st of section 11 of Chapter 28 of the Acts of Canada for 1873, relating to Controverted Elections.

5. The said complaint and petition is argumentative, and no certain and sufficient issue can be taken thereon.

Halifax, 24th March, A.D. 1874.

(Signed.) WALLACE GRAHAM,
Attorney and Agent of above named Respondent.

To the Petitioner above named.

The preliminary objections were argued by J. N. Ritchie, Esq., Q.C., on behalf of the Petitioner, and R. L. Weatherbe, Esq., on behalf of the Respondent.

The Court now (August 17th) delivered judgment:

ALEXANDER JAMES, ESQ., Q.C.:—The first objection to the petition in this case is that this Court has no jurisdiction or authority whatever, not being a Court of the Dominion under Sec. 101 of the British North America Act.

I am unable to perceive any force whatever in the argument in support of this proposition. That enactment authorized the Dominion Parliament to constitute a Court of Appeal and such other Courts as should be necessary for carrying out the laws of the Dominion, while the constitution of Provincial Courts was left to the Provincial Government under Sec. 92, sub-Sec. 14 of the Act. This Court is constituted by the Dominion Parliament for the purpose of carrying out laws of the Dominion relating to the political government of the Dominion. It is true that the Court sits and acts in a part of the Dominion whose boundaries made by the law coincide with those of the Province of Nova Scotia, but its action can affect no person or proceeding whatever except in so far as that person or proceeding relates to the Dominion of Canada. It executes no laws of the Province of Nova Scotia, except so far as they are adopted and made applicable to the Dominion by express legislation of the Dominion Parliament. It is therefore clearly such a Court as was contemplated by Sec. 101 of the B.N.A. Act. The purposes for which the Court has been constituted are most necessary for the welfare of the Dominion, and most important in their results, inasmuch as the exercise of the powers of the Court must necessarily affect the personality of the House of Commons, and the relative strength of parties in that august body. Nay, it is quite conceivable that some conjunction of circumstances may hereafter arise in which the Election Court for this Province, which shall succeed this Court already provided for and constituted by Act of Parliament, may, by some of its decisions, be the means of even unseating a ministry and dethroning a previously triumphant political party. It would be a public misfortune if no Court existed by which the important functions entrusted to this Court by Parliament could be lawfully exercised, and I believe there are no reasonable grounds for doubting that it is not a mockery

or a shadow, but a real Court, and has real and important functions, one of which is to entertain and adjudicate upon the petition now under consideration.

But the learned Council for the Respondent has urged upon us that if we have any power at all it is of a limited and restricted character—that in our adjudication we are tied down strictly to the letter of statutory enactments, and we have no power to set aside any election except when the same has been vitiated by the corrupt practices forbidden in section 18 of chapter 27 Acts of 1873. We are told that no increase of corruption, no amount of fraud or force, of mistake or accident, will suffice to avoid an election, unless the same is provided against by that section or some other statute of the Dominion of Canada.

If this position be sound, we have no power to entertain this petition, but ought to dismiss it, as we are asked to do, for want of jurisdiction. It is therefore important that we should consider what are the powers of this Court in reference not only to the immediate question, but to many other questions not expressly provided for by statute, which will doubtless arise hereafter if they are not involved in transactions which have already occurred in the course of the recent elections, some of which it may fall to the province of this Court to consider.

The power originally vested in the House of Commons in relation to Controverted Elections was extremely large and comprehensive. It was written in no code nor embodied in any statute. It grew up as did the Common Law, out of the necessity of meeting and controlling as they occurred anomalous proceedings affecting the character of Parliament, as reflecting accurately the sentiments of the people. The public policy of a people governed by representative institutions must necessarily require that the popular voice be accurately expressed in every election. From this policy proceeded several parliamentary principles. One of these was that every election which did not in fact, whether from fraud, force or mistake, result in returning the candidate who possessed the confidence of a majority of the electors was, and should be declared a void election. Another, that whenever a candidate was proved to have used either

by himself or his agents corrupt means to obtain his election, the election should be declared void. There were other principles, but these were the most comprehensive and important, and any elections obtained by these means were set aside. I do not say that elections were set aside frequently on these grounds before legislative enactments were passed, but it is clear from all the cases, ancient and modern, to some of which I shall hereafter refer, that these were principles of the Common Law of Parliament independently of statute.

The whole jurisdiction of the House of Commons was transferred by the Granville Act to special committees of the House, chosen to try such Controverted Elections, and if I read aright the decisions of committees extending over some 120 years, they exercised the power of setting aside elections not only upon express legislative enactments, but upon the fundamental principles of the Common Law. At the same time the Judges in Westminster Hall recognized the Common Law as existing side by side with the statutory enactments for the repression of corruption at elections. (*Lord Mansfield in Rex. vs. Pitt*, 3 *Burr.* 1335.) Up to the passing of the Imperial Act 31 and 32 vic., chap. 125, for the trial of Controverted Elections by the Court of Common pleas, I think no case can be found deciding that the fundamental principles of the Common Law, relating to irregular and corrupt elections were ever abrogated by the several statutes which were passed from time to time on the subject, but on the contrary the Common Law was always recognized as being still in full force.

A further change in our Legislation has taken place both in England and in Canada. The Election Committees have been abolished and independent legal tribunals have been substituted for them. The question now arises what are the powers of this New Court. Are they those that existed in the Parliament originally and afterwards in the committees under the Granville Act? It would be a great misfortune if no court existed with power to set aside an election, obtained by the grossest fraud force or error for want of legislative enactment which must be the case if we adopt a nar-

row construction of the statutes and throw overboard the principles of the Common Law. If the power of this Court were so limited, our House of Commons would soon cease to represent the people. We would be governed by the violent, corrupt and ignorant elements of society. No greater misfortune could happen to a free people.

It is not necessary that a statute which abolishes a tribunal, so necessary to the well being of the country and establishes another in its place should say in so many words that all the powers of the old are vested in the new. While there is not a word in the statute to restrict in any way the Jurisdiction of the Court as contended in argument, there are several sections which clearly indicate that it was the intention of the act that this Court should avoid elections for other causes than those mentioned in Chap. 27, Sec. 18, and were it not so the preamble alone which is inserted for the very purpose of pointing out the scope and intention of the act is quite sufficient to show that all the existing laws relating to Controverted Elections are to be carried out by this Court. Its language is exceedingly comprehensive, far more so than that of the English Act under which many cases have been settled in whole or in part upon principles not enacted in the statutes. For instance, I cannot find in the English Act any provision for a scrutiny being held further than by inference from the section corresponding with sections 19 and 54 of Chap. 28 (*Sec.* 11 *sub. sec.* 13 *and sec.* 53, *Wolf X. and XIX.*) Yet the English Judges have held scrutiny after scrutiny, under those clauses without question or doubt. If that Act were construed as it is alleged ours should be, a large proportion of their proceedings must have been wholly illegal. Fortunately we have the report of numerous recent cases tried before the ablest Judges of the three Kingdoms, and a few extracts from them will be sufficient to satisfy us that we are by no means restricted to the causes for avoiding elections prescribed in Sec. 18 of Chap. 27.

Had that statute never been passed, can it be contended that any Court, having general power to try Controverted Elections, has not power to avoid an election for bribery by a Candidate or his Agents? It is my opinion after mature deliberation and examina-

tion of all the authorities, cited and others which were not cited that this Court may declare an election void for *any* cause for which an election committee could have done so. The decisions to which I am about to refer shew that the Court of Common pleas in England, of which this Court is, for the purpose of trying Controverted Elections, the counter part, claim and exercise the power of avoiding elections, not solely for causes specified by statute, but for any cause which has interfered with the purity, the freedom, or regularity of elections, and which has been recognized by either Statute or Common Law as sufficient. *Bedford Case*, 1, *O. and H.* 40 (BARON MARTINS—"But it has long been held, before these Acts of Parliament passed at all, that by the Common Law of the Land, that is law not created by the enactments of Acts of Parliament, bribery, undue influence, and undue pressure vitiated an election" ——"or if it could be proved that there was treating in all directions, on purpose to influence voters, that houses were thrown open where people could drink without paying for it—*by the Common Law such election would be void, because it would be carried on contrary to the principle of the law.*

Cheltenham case, (1, *and H.* 62.) Petition alleged undue influence, did not contain any allegation that election was void at Common Law, on account of general intimidation and did not pray the seat. BARON MARTIN:—"My impression is that evidence may be given to show that the election *is void at Common Law, &c., &c.* "In the event of its being thought fit to rely on evidence of this kind * * * * * another paragraph should be put in the petition and the objection to the election should be *general violence toward voters.*"

Coventry case (1, *and H.* 105) WILLIS J., remarked that it might in his opinion be laid in the petition that an agent of the member had got voters personated and *that that if established would be sufficient fraud at Common Law to set aside the election.*

(*Ibid.* 107.) In regard to bribery he said "with respect to bribery as well as with respect to treating, *I shall ever hold it to be a wise and beneficial rule of constitutional law quite apart from* 17 *and* 18, *vic., C.* 102, *that for the purpose of securing freedom* and

purity of elections, Candidates should be answerable for the Acts of their Agents, and that a person can no more claim to be a member of Parliament, for a place as the result of an election in which his agent is guilty of bribery, than a person can fairly claim a prize if the person whom he employs to ride his horse or steer his vessel was held guilty of foul play in the course of his employment.

In the *Salford Case*, (1, *O. and H.*, 134 (BARON MARTIN said, "If a Candidate deliberately and of purpose, runs counter to an Act of Parliament which directs a thing not to be done, I think that Common Law *will operate upon it and the election will be void.* However, I shall not decide it myself, but if it is necessary I shall grant a case for the Court of Common Pleas." In this case the Petitioner contended that the conveyance of voters was illegal, but the Respondents' counsel urged that the violation of the Act might possibly render a Candidate *liable to an indictment, or some punishment, but nothing more.*

Blackburn Case (1, *O. and H.* 200) WILLES J. "The corrupt practices prevention Act to my mind *does not more than lay down in very distinct terms that which has been always the understood law of Parliament*, or rather the Common Law of the Land, with respect to the election of members of Parliament; that is to say that no matter how well the member may have conducted himself in the election, &c., if an authorized agent of his, a person whom he has set in motion to conduct the election, is in the course of his agency, guilty of corrupt practices, an election obtained under such circumstances cannot be maintained."

We are told that our power is limited because the legislation is meagre. But if in England where the statute law is exceedingly full and explicit it is held that the Common Law is in full force, and so far from being abrogated has been but cultivated and developed by the statutory enactments, which are indeed nothing more or less than an *authoritative* expositions of what was always the Common Law, how much more should the Common Law apply here where we are without any enactments to avoid an election for intimidation, violence, personation, general treating and drunkenness or gross error? The very paucity of our Legislation renders the Com-

mon Law of Parliament, more applicable and more valuable to us than to our fellow subjects in Britain.

The Common Law principle applicable to this case I take to be that every election in which by mistake or fraud the candidate, having the support of a majority of duly qualified voters, has failed to be elected and returned, must be set aside on his petition to the proper Court; and believing this to be the proper Court I proceed to consider whether this petition, if its allegations are proved, is sufficient for the purpose.

The only question here is, does the petition set forth an irregularity so substantial as would have been sufficient at Common Law, under the principle I have recognized, to avoid the election.

It is alleged in the petition that in the spring of 1873 an alphabetical list of the electors of Inverness, qualified to vote at elections for the House of Commons, was made up and filed with the Clerk of the Peace as provided by Sec. 10 of Ch. 27 of the Dominion Acts for 1873; that such list contained the names of all the persons qualified to vote at such election; and that it was the legal and only legal list on which the election ought to have been run; that instead of using this voting list, (or register, for they mean the same thing,) the Sheriff adopted the list for a previous year; that in two districts Nos. 11 and 18, the list for 1872, which was used, comprised the names of 328 persons, far more than double the number of voters, (the most of whom, by some sudden and unexplained calamity, were reduced in one short year from comparative affluence to indigence, so severe as to deprive them of their political privilege in elections), no less than 318 of whom voted for the Respondent, whose whole majority in the election was 121.

Similar discrepancies in the two lists in other districts are set out, and it is alleged that for the whole county there were 284 more qualified voters on the list of 1872 than on that for 1873.

It was argued at the hearing that these statements of figures were irrelevant, but I think them the very gist and essence of the petition. The real substantial difficulty on which the petition is founded is not that the wrong list was used, but that the wrong man has been returned. Using the wrong list would be no cause whatever

for avoiding an election, unless it affected or may have affected the resnlt. If there had been a difference of only ten or even fifty votes in the two lists, the Respondent, heing elected by 121 majority, would clearly be entitled to the seat, notwithstanding the mistake. In the *Greenock case* (1, *O. and H.* 249,) there were very great and material irregularities in arranging the polling booths and the places of voting, but there was not any evidence to show that the fairness or result of the election was at all affected by the arrangement that the Sheriff did make. Petitioner upon this contended that the Sheriff had acted contrary to the statutory provisions upon which this matter proceeds, and that the election ought to be declared void. Lord Barcaple:—"I think that the statutory provisions are of such a kind that it wonld reqnire that *something much more* shonld be made ont than merely that they were transgressed in good faith and withont any serious consequences, to avoid the election." Here the Petitioner, although he does not charge fraud, alleges that a nnmber of unqnalified persons were on the list,—far more than sufficient to reverse the majority,—and that in fact he lost the election in conseqnence of the irregularity.

If this is proved at the trial, as stated in the petition, the election ought to be declared void, as I have no doubt it would have been by any election committee under the Common or Constitutional Law of Parliament quite independently of any enactment. It would be equally a cause for avoiding the election if it were done fraudulently, althongh it could not have affected the result. It is admitted in the petition that there was some irregularity or defect in the list of 1873, but it is not admitted that it was an illegal list. What the nature of the irregularity was it is impossible for us to determine, as it is not set out in the petition. It may have been an error of so grave a character as to bring it within the words of the statute (R. S., 2nd series, app. elections, sec. 27, page 758) which enacts that if no register has been "made up" for the year, the list of the previous year shall be resorted to. But so far from admitting that the objection was of a grave or serious character, the petition alleges that it was prepared in accordance with the laws which were then in force in the Province; that it contained the names of all the qualified electors; that it was duly filed with the Clerk of the

Peace and was "the regular and proper and only list of the electors of said "County qualified to vote at the said election."

If these statements are proved to be untrue, or if, notwithstanding their truth, the Respondent can shew good and sufficient reasons why the Judge shall sustain the register of 1872, it will be open to him to do so at the trial. At present we cannot, in the face of these allegations, presume that the irregularity admitted in the petition was of so grave a character as to render unnecessary the adoption of a list so extremely liberal in its qualification of voters.

I do not mean that in a case of this kind, a Judge on a trial should enter into an investigation as to how any voters improperly placed upon or omitted from a register have voted or would have voted. This would clearly be a most unsatisfactory and impracticable enquiry. But I think it should appear before an election is set aside, for irregularity, that the error was such as might possibly have affected the result. In this case the irregularity, if proved as stated, may possibly have changed the event of the election, and therefore sufficient cause is shewn in the petition for proceeding to trial.

In this case there is no charge of fraud or wilful error against the sheriff, therefore there is no ground for making him a Respondent or treating him as such. If any charges of that nature are made against him at the trial, or if the Judge should be of opinion that his conduct requires investigation, it will be in the discretion of the Judge to permit him to be heard in person or by counsel, as if he were a Respondent.

I am of opinion that the preliminary objections are insufficient and ought to be set aside.

Hon. William A. Henry:—"I agree with the conclusion arrived at in the judgment just delivered, that this case must go to trial to ascertain the facts connected with the proceedings taken to form registers of voters in the County. The Act under which the election was held, (Chapter 27 of the Statutes of Canada 1873), refers to the Statute of Nova Scotia 1863, and enacts that among others, the provisions of section 27 of the last mentioned Act should be applic-

able to such future lists as are provided therein. In section 10 of the first mentioned Act, provision is made for amending and adding in a prescribed manner to the lists or registers then existing, "within three months" from the passing of the Act. Section 27 of the Nova Scotia Act, referred to, provides that, "if from any cause "the register of electors, for any polling districts is not made up in "any year the register last made, shall be used in its stead for the "purpose of the election." The petition in substance alleges that no list or register was made under section 10, but that a legal list was made in the Spring of 1873, of electors qualified to vote for members to serve in the House of Commons, and duly filed with the Clerk of the Peace, and that it was the *only* list by which electors for that County were qualified at the election in question; and, that if the list had been made under the 10th section before mentioned the names, would have been the same. That the Returning Officer, however, improperly failed to use the list so made in the Spring of 1873, and instead thereof used for the purpose of the election, a list or register made in 1872. The petition undertakes to give a minute detail of the comparative numbers of qualified electors in certain polling places in the County on the two lists. It further alleges that in consequence of the improper list being used, the Petitioner lost the election; and he prays that it may be determined that the Respondent was not duly elected or returned, and that the election was void.

Of the five objections filed and argued the first denied the jurisdiction of this Court to take cognizance of such matters, because of the incapacity of the Dominion Parliament to create such a Court. I prepared a judgment on this point in the "Hants" election case where the same objection is taken, before considering the petition and objections in this case, which I will shortly read; and I refer to that for my decision herein on that point. As to the two next objections, I will content myself with saying generally, that I think the complaint of a wrong and illegal list having been used at the election, is I think sufficiently made; and if sustained by necessary proof may, and I think should, avoid the election. If under a fair construction of the two Acts, taken together the list made in the Spring of 1873, should have been the one used, but was not, then

it seems to me the election is void, no matter how its use tended to produce the return of either of the candidates. Whether such did or did not produce a result either way, would be an inquiry difficult, if not impossible, in most cases; and would depend amongst other things upon evidence months afterwards from a host of excluded electors as to the Candidates for whom they intended to have voted when the election took place. Such an enquiry I consider upon that and other important considerations impracticable, and not one to be made on the trial, and for the reasons given, I consider it quite unnecessary. The position taken by LORD BARCOPLE cited by my learned Associate as to the polling booths does not, I think, at all, affect the position by me just taken. In that case the qualification and individuality of the electors were the same and although some irregularity as to the position of the booths was shown, but that irregularity did not appear to affect the result, it was judged that the provision for the booths being only *directory* did not call for strict performance. In this case, however, the constituency which the law has qualified has been changed and therefore the provision in this case cannot be and is not merely *directory*. We have not however the necessary evidence before us to enable us to decide which of the two lists contended for is the one that should have been used, and we are therefore not in a position to set aside a petition that fully raises the, in this case, important issue.

The 4th objection is that there is no complaint of an undue election or return. Under our rule, "essentials of a petition," it is prescribed, "1st. It shall state the right of the Petitioner to petition "within section two of the Act—2. It shall state the holding and "result of the election and shall briefly state the facts and grounds "relied on to sustain the prayer." Sec. 10 of the Act provides for "undue election of a member, or of no return or of a double return." That is, as I take it, merely descriptive of the general nature of the petition but does not necessarily refer to the *wording* of the petition; and taking the clause of the rule (3) above quoted which does the presentation of a petition "complaining of an undue return or not in my judgment clash with section 10, I think the complaint of an "undue election" may be sufficiently made without using those identical words, and that the complaint in this petition is sufficiently explicit and legitimate.

The fifth and last objection I think cannot be sustained, being in my opinion too general; but if not so it is fully answered, for an effective and available issue is capable of being raised on the complaints in the petition. The question of the costs of the argument is in this case also reserved.

JAMES W. JOHNSTON, ESQ., Q.C.:—The first preliminary objection challenges the jurisdiction of this Court, and on the argument the Respondent's Counsel took the objection that the Dominion Legislature had no power to constitute this Court, it being only Provincial. Sec. 91 and 92 of the British North American Act were appealed to in support of that proposition.

1. The jurisdiction of this Court is not the subject of preliminary objection; preliminary objections are confined to legal questions to be urged against the petition or against any further proceedings therein.

2. The objection comes too late; it should have been made in the first instance, and before any step was taken. Every step taken admits the jurisdiction.

3. This Court is not Provincial, it is Dominion. It was constituted for a purpose with which the Local Legislature had no concern, and with a jurisdiction over matters not cognizable by the Provincial Legislature or any Provincial Court. The title of the Act is "an Act to make better provision, respecting election petitions and matters relating to Controverted Elections of members for the House of Commons," and the Act recites that it is expedient to provide by one law, common to the whole Dominion for the trial of election petitions, and the decision of matters connected with the Controverted elections of members for the House of Commons of Canada. The Court established by the Act, is a Dominion Court with branch Courts in the several Provinces of the Dominion, for convenience sake, each branch Court taking cognizance only of matters occurring in the Province to which it is attached. The report and decision of the Judge are to be certified to the Speaker of the House of Commons. Its judges in Nova Scotia were appointed directly by the Dominion Privy Council, and it has jurisdiction on strictly Dominion matters. It will not be contended that the House

of Commons has not sole control and jurisdiction over the conduct of its members or the organization of its own House. And no argument was presented to prove that, having that jurisdiction and control, it could not delegate its powers to any tribunal it thought proper to create.

The second objection urged at the argument under this head was that the Court had no machinery, by which to deal with the matter of the petition. The petition prays that it might be declared that the Respondent was not duly elected or returned, and that the election was void—there is nothing in this prayer different from that of other petitions that it is admitted that this Court is competent to deal with. The question to be tried being a mixed one of law and fact, the judge trying the petition, will adjudicate on the facts, and may, if he see fit, reserve the questions of law under sec. 23. Paragraphs 7 and 8 must be eliminated from the petition as containing matters of proof which are not to be stated in petition, and as being argumentative, the fact of the list containing more names than the list of the former year for the same district affording of itself no sufficient grounds to disturb the election.

The petition alleges no complaint against the Respondent; but charges that no alphabetical list was made up as required by sec. 10, chap. 27, 1873, that a list was made in the spring of 1873, which was the regular and proper and only list of electors qualified to vote at the election, and that the Returning Officer improperly and illegally used the wrong list at the election, and that the Petitioner lost his election in consequence of the illegal and improper conduct of the Returning Officer in using an irregular, illegal and improper list. It will be perceived that the Petitioner here does not claim that he had the majority of legal votes, and ought therefore to be returned, in which case a scrutiny might be hard, and such allegation in the petition is necessary before the votes can be scrutinized. *Leigh and Le Marchant Law of Election page* 75. "When the petition alleges that the unsuccessful Candidate at the election had the majority of legal votes, and ought therefore to be returned, the manner of ascertaining the truth of the allegation is by a scrutiny of the votes." So *Wolferstein page* 89; when the Petitioner claims the seat for the unsuccessful Candidate alleging that he had in fact the

majority of legal votes, the Court will proceed with a scrutiny. "The statement that the Candidate had a majority of legal votes is necessary." The Petitioner's whole complaint resolves itself into this, that the Returning Officer illegally and improperly used an irregular, illegal and improper list, and the Returning Officer ought, therefore to have been made Respondent in order to afford him an opportunity of defending himself. Section 52 of Cap. 28, 1873, provides that where an election petition under that Act complains of the conduct of a Returning Officer, such Returning Officer shall for all the purposes of that Act, except the admission of Respondents in his place, be deemed to be a Respondent. The great difficulty I have had is as to the practice to be adopted. Ought the Petitioner to have made the Returning Officer a Respondent? Is the petition void on that account, or can the Court order the Returning Officer to be made a Respondent? I do not find that any Act refers to this or regulates the practice.

There are two cases bearing on the subject that I have found—one the *Borough of Warrington*, 1, *O. and H.* 42, in which the Mayor of Warrington was one of the Respondents, but whether originally one, or subsequently added, does not appear. The other, *The Tamworth case*, 1, *O. and H.* 77, in which Mr. Justice WILLES intimated that in his opinion the Mayor ought to have been made a party to the petition if evidence was to be given to implicate him in any way. He would then have had the opportunity of defending himself, but what action was taken in the premises, did not transpire. It will be observed in this case that the Mayor was only incidentally implicated. It was proposed to ask a witness a question with a view of proving that the Mayor was implicated in the corrupt treating, and the question was probably not pressed, as Mr. Justice WILLES said, "I will not call upon the Mayor because I do not wish unnecessarily to put him in the position of a witness—as he is not charged in the petition." Here the whole gravamen of the charge is against the Returning Officer, he is charged with having illegally used illegal lists and having by the use of such lists occasioned the loss of the seat to the Respondent. *Wolferstein, page* 4, "The jurisdiction of the House of Commons over Returning Officers does not seem to have been taken away by the late Act, the only doubt being

whether a petition complaining only of the conduct of the Returning Officer should be presented to the Court of Common Pleas, as being an election petition within the meaning of the Act or to the House of Commons. "It is apprehended however," says the author, "that the former (the C.P.) would be the proper course, at all events in the first instance, and were the (C.P.) to refuse to adjudicate therein, a petition to the House of Commons could be subsequently presented." So page 42, speaking of the old law, he says, that Returning Officers complained of in the petition, were allowed to appear by Counsel though no relief was prayed against them and they were not parties, but adds, this case is now provided for by sec. 51, above referred to. The words of the section,—that where an election petition complains of the conduct of a Returning Officer, he shall be deemed to be a Respondent,—at first sight occasioned some difficulty as to the meaning to be given to the word *deemed*, whether the Court were not bound to regard him as if he were originally a Respondent and allow him to appear by Counsel, &c., and this I think would be the course to be pursued where the Petitioner complained incidentally of the Returning Officer, but that where the whole charge is against him, he ought to have been made Respondent in first instance.

The Canadian Act makes no provision respecting the list or the register of votes. All *that* is provided for in the Provincial Act, chap. 28, 1863, in the Appendix to 3rd series page 758. Now, this Act does not void an election, because the wrong list was used. It declares how the list shall be made up and directs that if the register of electors for any polling district is not made up in any year, the register last made up shall be used. Sec. 46 provides that the sheriff shall furnish his presiding officers at each of the polling districts with a true copy of the electors for that polling district;—sec. 57 that the presiding officer before an elector is permitted to vote, must find the name on the list, and penalties are imposed on the assessors, revisors and sheriff for neglect of duty. Under the old Act in England the irregular holding of the Barrister's Court has been held vitiate votes registered thereat, and the committee struck them off the poll, (*Wolferstein* 107,) but all these cases have come under review on a scrutiny—in this case no scrutiny has been

demanded nor any vote asked to be struck off the poll—the whole list is attacked and the election prayed to be set aside.

I have very grave doubts whether under all the circumstances of this case this Court had any jurisdiction over the matter and whether the Petitioner ought not to be remitted to the House of Commons—but sec. 19 and chap. 28, clothe the judge trying the petition with very large powers, his province is to determine what party was duly returned or elected or whether the election was void," and this Court may not lightly interfere with or control the power thus conferred.

I am therefore of opinion that the petition must be tried by a judge, premising that the question to be tried be limited to the legality of the list used, and that no evidence to compromise the Returning Officer be received, and as the question will be one of law, the judge after receiving the evidence may reserve the question for the consideration of this Court under sec. 23 or make a special report to the speaker under sec. 21 of the Act.

GEORGE HIBBARD, Petitioner.

vs.

CHARLES TUPPER, Respondent.

Decision on preliminary objections. Practice as to recriminatory charges.

In this case the petition was filed in the following form:—

IN THE ELECTION COURT.

"*The Controverted Elections Act*, 1873."

Election of a member for the House of Commons for the County of Cumberland, holden on the fifth day of February, A.D. 1874.

Dominion of Canada,
Province of Nova Scotia,
To Wit:

The petition of George Hibbard, of Lower Cove, in the County of Cumberland, merchant, whose name is subscribed hereto:—

1. Your Petitioner, George Hibbard, was duly qualified to vote at and was a candidate at said election.

2. And your Petitioner says that the said election was holden on Thursday, the fifth day of February, in the year of our Lord One Thousand Eight Hundred and Seventy-four, when your said Petitioner and Charles Tupper, of the City of Ottawa and Province of Ontario, C.B., Doctor of Medicine, were candidates, and the Returning Officer has returned the said Charles Tupper as being duly elected.

3. And your Petitioner says that the said Charles Tupper by himself and his agents and other persons in his behalf, was guilty, before, during and after said election, of corrupt practices, and his said election and return were and are undue, illegal and wholly null and void, and he the said Charles Tupper used the said corrupt practices by himself and other persons on his behalf for the purpose of procuring his said election, whereby and by means whereof he the said Charles Tupper is disqualified and incapacitated from sitting or voting in the present Parliament of the Dominion of Canada.

4. And your Petitioner says that the said Charles Tupper, to the purpose of procuring his said election, was guilty of bribery before, during and after said election, and the said return of the said Charles Tupper is undue and wholly null and void, and he, the said Charles Tupper is incapacitated to serve in the present Parliament of Canada.

5. And your Petitioner says that the said Charles Tupper, to procure his said election and return, by himself and his agents, directly and indirectly employed means of corruption by distributing, giving and providing sums of money, employment, gratuity, reward, bonds, judgments, bills, notes, and promise of the same, and by himself and his authorized agents for that purpose threatened electors with losing office, salary, income, and advantage, with intent to corrupt and bribe electors to vote for him the said Charles Tupper, and to keep back electors from voting for your Petitioner, and caused to be opened and supported at his cost and charges of him the said Charles Tupper, houses of public entertainment for the accommodation of the electors of said county, whereby the said Charles Tupper was and is duly elected and returned.

6. And your Petitioner says that the said Charles Tupper, to procure his said election, employed, directly and indirectly, means of corruption by distributing, giving and providing sums of money, employment, gratuity, rewards, bonds, judgments, bills and notes, and promise of the same, and he, the said Charles Tupper, is and was thereby unduly elected and returned, and his said election and return are by means of said corrupt practices used and employed for the purpose of procuring the election of him the said Charles Tupper, wholly null and void, and he, the said Charles Tupper, was and is disqualified and incapacitated from sitting and voting or serving in the present Parliament of Canada.

7. And your Petitioner says that the said Charles Tupper, to procure his said election, by himself and his authorized agents for that purpose, threatened electors with losing office, salary, income, and advantage, with intent to corrupt and bribe electors to vote for him, the said Charles Tupper, and to keep back electors from voting for the said George Hibbard, whereby the election and return of the said Charles Tupper is undue and wholly null and void, and the said Charles Tupper is incapacitated from serving as a member in the said present Parliament.

8. And your Petitioner says that the said Charles Tupper, for the purpose of procuring his said election, was guilty of opening and causing to be opened and supported at his cost and charges, houses of public entertainment for the accommodation of the electors of said county, whereby his said return is undue and void, and he, the said Charles Tupper, is disqualified from serving as a member in the present Parliament of Canada.

9. And your Petitioner says that the said Charles Tupper, to procure his said election, directly and indirectly gave and provided rewards and promises of rewards, whereby his said return was and is illegal and undue.

Wherefore your Petitioner prays that it may be determined that the said Charles Tupper was not duly elected or returned, and that the election was null and void, and that he, the said Charles Tupper shall be incapable of being a candidate or being elected or returned during the present Parliament of the Dominion of Canada.

(Signed.) GEORGE HIBBARD.

The following preliminary objections were filed by J. S. D. Thompson, Esq., Attorney of the Respondent:—

IN THE ELECTION COURT.

"The Controverted Elections Act, 1873."

Election of a member of the House of Commons for the County of Cumberland.

Province of Nova Scotia.
Dominion of Canada, } To wit: }

1. The said Respondent, by way of preliminary objection to the petition herein, and any further proceedings on the part of the Petitioner, says that the said Petitioner by himself and his agents and other persons on his behalf, was guilty before, during and after said election of corrupt practices, and the said petitioner used the said corrupt practices by himself and his agents, and other persons on his behalf, for the purpose of procuring his election as a member of the House of Commons for the County of Cumberland.

2. And the said Respondent further says that the said Petitioner by himself and his agents, and other persons on his behalf directly and indirectly employed means of corruption, by distributing, giving and providing sums of money, employment, gratuity, rewards, provisions, bonds and judgments, releases, bills, notes and promises of the same, and by himself and his agents and other persons in his behalf threatened electors with losing office salary, income and advantages with intent to corrupt and bribe and influence electors to vote for him the Petitioner, and to keep back electors from voting for the Respondent, and caused to be opened and supported at the cost and charges of the said Petitioner, Houses of Public Entertainment for the accommodation of the electors of the said County with the intent herein-before stated.

3. And the Respondent further says that the said Petitioner, with the like intent and his agents and other persons on his behalf directly and indirectly gave and provided rewards and promises of rewards and used threats and undue influence to keep back electors from voting for the Respondent.

4. And the Respondent further says that the said Petitioner with the intent aforesaid was guilty of bribery before, during and after said election.

Wherefore your Respondent prays that evidence may be taken upon these objections and charges, and that the said Petitioner, if said objections and charges be sustained, may not be permitted to proceed any further with the said petition or take any objection to the return of said Respondent.

Halifax, N.S., July 2nd, 1874.

CHARLES TUPPER by JOHN S. D. THOMPSON, his Atty. and Agent, 12 Bedford Row, City of Halifax.

The argument on the above objections were conducted by R. L. Weatherbe, Esq., on behalf of the Petitioner, and by the Hon. James McDonald, Q.C., and J. S. D. Thompson, Esq., for the Respondent.

JAMES W. JOHNSTON, ESQ., Q.C.:—The preliminary objections filed in this case differ materially from those in any other case that has yet come under review before us. Those have been objections to the form and substance of the petition, this is an attack upon the Petitioner himself—alleging Acts of corruption on his part, in connection with the election and praying that evidence may be taken upon these objections and charges, and that if they are found to be well sustained the Petitioner be not permitted to proceed any further with the petition, or take any objection to the evidence of the Respondent.

The first point to be determined, is how far the jurisdiction of this Court, sitting *in banco*, extends in the premises. Our authority is conferred by sec. 14, chap. 28, "The Controverted Election Act 1873," and it is a procedure confined to this Court, finding no place in the English Act.

This section authorizes the Respondent to present in writing any preliminary objections or grounds he may have to urge against the petition—or against any further proceedings therein; these objections or grounds, the Court or any judge is authorized to hear and determine in a summary manner, and provided they are not allowed, the Respondent on their dis-allowance, has a certain time within which to file his answer and the cause then proceeds to hearing and final adjudication.

These objections as before stated are not against the sufficiency of the petition, but against any further proceedings being had thereunder. After deliberately considering the Act in all its parts, and the law and the cases as far as they bear on the subject matter, we have come to the conclusion that the objections and grounds contemplated by the Act, and to be urged in this summary and preliminary mode are confined to legal objections, that they are in fact in the nature of a demurrer; they are to be objections to the form and substance of the petition, objections which if they prevailed

would render useless any enquiry into the merits, and are therefore to be urged in a summary manner to prevent the necessity, and avoid the expense attending a protracted trial before a judge in the County.

The words in section 14, "against the petition or against any further proceedings thereon," must be read as one sentence—not as divisible or as pointing to distinct grounds or classes of objections that may be each sucessfully urged against the petition. It must be such an objection as, if allowed, will of necessity stay all further proceedings, and dismiss the petition itself. Sections 18, 22 and 23 of the Act, as well as its whole scope and purview, shew that the only questions to be withdrawn from the judge at the trial are legal questions—he is the sole and absolute judge of the facts and the merits, and with his jurisdiction this Court may not interfere.

Now, on the very threshold of the investigation—before the Respondent bas even filed his answer or the petition is at issue—we are required to investigate the facts of the case, and to determine whether or no the Petitioner has any *locus standi* in this Court, when his petition—the statements contained in which, for the purposes of this argument, we must assume to be true—unequivocally asserts his right to petition.

The objections themselves wind up with a prayer that evidence may be taken on certain acts alleged to have been committed by the Petitioner; and if they are sustained the Court is prayed to quash the petition; but this Act has provided us with no machinery to carry out. This Court, sitting as we now are, has no power to call witnesses before it, or to send a judge into any county to try facts and report for our adjudication. The power of the Court is limited to the adjudication of questions of law raised on special cases prepared or reserved by the judge on the trial, and over questions raised as to the legal sufficiency of the petition.

The right of a Candidate to petition is beyond doubt. Section third of Chap. 28, defines, "a Candidate to mean any person elected to serve as a member, and any person who has been nominated as, or declared himself a Candidate at an election," and by section 10, sub-section 3, a petition may be presented "by some person alleging

himself to have been a Candidate at such election," and the Petitioner here has clearly brought himself within the provisions of both sections. *Wolferstan page* 8. "But a person alleging himself to be a Candidate is entitled *prima facie* to petition unless his disqualification is obvious and *incontestable.*" In this case not only is the Petitioner *prima facie* entitled to petition, but the Respondent has himself for the purposes of this agreement, admitted the truth of the allegations in the petition.

The Respondent here does not claim the seat and recriminatory evidence is on that account inadmissible on the trial, and therefore his right to petition is not affected by any course pursued by him at the election brought under review by the petition, and cannot on the trial be enquired into. We should be running strangely counter to the spirit and intention of the Act were we to hold that a petition, could not be presented because by possibility the Petitioner had himself used means of corruption at the election, or that the Candidate returned may close all enquiry into the means he used to gain his election because the unsuccessful Candidate was *particeps criminis. Wolferstan page* 9 says, "that it is no objection to the petition of electors that their Candidate is disqualified unless *semble* the petition only claims the seat for the Candidate on the ground that he had the majority of legal votes." By the English Act a voter guilty of bribery loses his vote and is disqualified from voting for a period, and therefore his interest in the franchise being gone, he has no *locus standi*—and no interest in demanding a scrutiny—but it is far different when the Petitioner alleges other disqualifications. These may be investigated with a view to maintaining the purity of elections, stamping out corruption of all sorts, and purging the County; but while where the seat is not claimed the conduct of the Petitioner is not subject to review as affecting himself or his standing, there is a penalty imposed upon the unsuccessful Candidate who violates the law; Sec. 19 of chap. 28, "an Act to make temporary provision for the election of members to serve in the House of Commons, provides that if any Candidate who shall not have been returned is proved guilty before the proper tribunal of using during any election means of corruption he shall be incapable of being a Candidate or being elected or returned during the Parliament

for which such election was held." I may remark in passing that the proper tribunal is not this Court sitting *in banco*, but the judge who tries the election in the County;—but that proof is not to be given on the trial of the election, where such means of corruption have been used—unless indeed the seat is claimed—and recriminatory evidence offered, but on the trial of any subsequent election when the unsuccessful Candidate shall stand during the period of his disqualification under the Act. *Wolferstan page* 8, referring to subsection 2 of clause 10, chap. 28, "the petition may be presented by some person claiming a right to be returned or elected at such election," remarks in the case of Candidates petitioning whether claiming a right to have been returned or merely alleging themselves to have been Candidates at the election even less strictness is required in the terms of the statement of the right to petition, but in both cases the Petitioner must be prepared to prove his lawful claim or that there was no lawful objection to his alleged Candidature "on the ground for instance of his having been convicted by a previous committee or judge of a disqualifying offence." And the *Houston case* referred to on the same page and cited at the argument by the Respondent's Counsel does not favor the view by them taken. There M's. election having been declared void by a committee on the ground of bribery, he stood in the vacancy, and being unsuccessful, petitioned against the return of his opponent. It was objected that as he could not legally be a Candidate, he could not petition; the committee resolved, "that the said M. was not elible to fill the vacancy occasioned by the said resolution" (why not elible? Because of the bribery,—not at the election thus petitioned against but at the election declared void, and of the disqualification attached to such bribery.) "M. was not therefore allowed to proceed." In the *Taunton case* referred to in a note on the same page, it is stated that the objection to the Petitioner could not proceed, because the sitting member was prepared to prove bribery against him, was overruled; but the note adds, "this it will be observed refers to bribery at the election, and not at a former one." The evidence of WILLES J. before the Select Committee on Parliamentary and Municipal Elections, p. 447, is to the same purpose. That learned Judge said, "the law is clear, that during the same Parliament a person, who has been a candidate, guilty of bribery at an election cannot hold his seat

against a Petitioner, and that if he be returned you may bring up against him any thing he has done at any former election, which could not have been brought up against him on some former petition. Now as the Petitioner by not claiming the seat, has effectually prevented the introduction of recriminatory proof, his action at the election under review cannot be brought up against him now, but may be, should he stand again during the present session of Parliament. The force of this becomes more apparent if we advert for a moment to the wide difference between the certificate and the report of the Judge. The certificate of the Judge under Sec. 19, Cap. 28, determines whether the member whose return is complained of, or any or what other person was returned or elected or whether the election was void. This certificate is final, and the question therein determined may not again be opened up. Not so the report which the Judge is to make under Sec. 20 to accompany his certificate. The question was thoroughly argued in the *Norwich case*, 19 *L.T., R.N.S.* 620, where it was decided that the certificate was final, and conclusive, under the terms of the section;—*contra*, however, as regards the report, which does not stop an enquiry into charges relating to a previous election against any person not seated by the certificate." Not being able to obtain access to the report, I quote from the Law of Elections and Election Petitions by *Leigh and Le Marchant*. The remark of these authors; "therefore it would seem that bribery, treating, and undue influence by a candidate or his agents at a former election during the same Parliament for the same place can be enquired into on a petition against the return of that candidate on a subsequent vacancy during the same Parliament for the same place"—and the Judgment of BOVILL C.J. and WILLES J., *in Stevens vs. Tillett*, 6 *L.R.C.P., page* 147, is in point. There the seat has been claimed, and recriminatory evidence actually gone into, and a report made by the judge, but the claim to the seat during the course of the enquiry has been abandoned;—it was determined that an enquiry could be subsequently entered upon, inasmuch as these could not have been ascertained or brought forward during the former petition.

Again the Respondents insisted on the argument that the Petitioner could only petition in one capacity, and that the Petitioner

had petitioned in the capacity of both Candidate and elector; but I can find nothing in sec. 10 of chap. 25, that limits the right to petition as a voter as well as a Candidate, if the party is so disposed. A similar objection to the reception of the petition was urged on the ground that the Petitioner had been guilty of bribery and that his vote was therefore void and he was himself disqualified from exercising the franchise and had therefore no *locus standi* enabling him to petition; but there is nothing in our statute law that disqualifies a voter guilty of bribery from voting at a subsequent election or from petitioning, and the Common Law does not effect the civil status of a voter, who has been declared to have taken bribes, and does not disqualify an elector who has administered bribes from voting afterwards at that or any other election. *Bushby's Manual* of the practice of elections by *Hardcastle page* 113, and if not so disqualified it is hard to understand why an elector should be deprived of the right of petition, vouchsafed him by statute.

The preliminary objections must be therefore disallowed, and the case to go on trial on the allegations in the petition, and such other evidence may be taken as will enable the judge trying the petition to report under sec. 20 of chap. 28, 1873.

Hon. William A. Henry, Q.C.:—The Petitioner alleges that he was duly qualified to vote and was a candidate at the election, that the Respondent was also a candidate thereat and was returned as duly elected. The petition then makes the usual charges of bribery and corruption against the Respondent, his agents and others at the election, and prays that it may be determined that the Respondent was not duly elected or returned, that the election was null and void and that the Respondent shall be incapable of being a candidate or being returned during the present Parliament; but does not claim the seat. Preliminary objections have been argued before us, charging the Petitioner with bribery and corruption at that election, and praying that evidence may be taken upon the objections and charges, and that the Petitioner, if the objections and charges be sustained, may not be permitted to proceed any further with the petition, or take any objection to the return of the Respondent.

We are therefore to consider the objections as "preliminary" ones which this Court is called upon to decide, and hereby express-

ing my concurrence in the general conclusions arrived at in the judgment just given. I will add some views of my own on the issues raised.

In the first place I am of opinion that such should not in view of the practice before the Judges in England be addressed to this Court; but, if at all, to the Judge at the trial. And, secondly, that in no case according to that practice, could the objection be taken in any way to prevent inquiry into, and a judgment in relation to, the charges against the Respondent. Such a course would, in my judgment, be diametrically opposed, not only to the expressed objects and purposes of the statutes against corrupt practices, and the practice and rules of Parliament, but to the course pursued by all the Judges in England, Ireland and Scotland, as well as the duties devolved by the statute upon the Judges of this Court; and at the same time it would tend to confer an immunity from the consequences of the illegal conduct it, may be of one guilty candidates, through permitting him, by proving similar offences against another, to shield himself. I cannot bring myself to any other conclusion than one that is calculated to prevent the occurrence of practices contrary to law and the introduction of a practice so highly inconsistent with every well recognized principle of Jurisprudence. I have carefully read all the cases reported by *O'Malley and Hardcastle*, as tried before the Judges in England, Ireland and Scotland, since the trials of election cases were handed over to them by the Imperial Act 1868, to the number of seventy; and in not one of them were recriminatory charges alleged against a petitioning candidate unless in cases where the seat was claimed; and I am therefore to conclude that if such could legitimately have been alleged as "preliminary objection," the ingenuity of the Counsel, (of the highest standing) who in those cases, acted for the Respondents, would have suggested that easy mode of clearing their clients from the charges of corruption made against them. When no such attempt was made, we may, I think, fairly conclude that it could not have succeeded if made. In the cases where the seat was claimed and recriminatory charges made, the invariable course pursued was first to try the charges against the Respondent, and if proved against him then for Respondent's Counsel to open his defence and the recriminatory

charges, and in cases where a scrutiny was to be held to try the recriminatory charges before engaging in the scrutiny, and if the recriminatory charges were proved in both cases the result was, first the unseating of the Respondent, and next a declaration that the Petitioner was ineligible through bribery to occupy the seat. (*See the Stafford case*, 1, *O. and H.* 288; *the Westbury case*, 1, *O. and H.* 47, *and the Norwich case*, 2, *O. and H.* 38.) Suppose then the seat had been claimed in this case and recriminatory charges made, we could not, under the practice, (which is our guide under the terms of the statute,) have received those recriminatory charges as "preliminary objections" to the further consideration of the case against the Respondent, and how much less would he be justified in doing so in a case where the seat is *not claimed*. The law is against the occupation of a seat in Parliament by any candidate guilty of bribery, and wisely provides that when one candidate is to be unseated for corrupt practices, he may, by proving recriminatory charges, prevent his opponent from occupying the seat of which he is deprived. For that purpose, and to that end alone, are those recriminatory charges provided to be made, and not by any means to stifle enquiry. Sec. 54 of "The Controverted Elections Act 1873" limits the enquiry to cases *where the seat is claimed*. It is the same in England. No Judge there has in any other case considered, or been asked to deal with, recriminatory charges; and why should we? To do so I consider would be beyond our prescribed duties. If the Legislature so intended, the enquiry would not seem to have been limited as it has been; and I think properly so, when the avowed object for which the recriminatory charges are provided to be alleged is considered. This Court is moved "to take evidence of the charges against the Petitioner, and if sustained to stay all further proceedings on the petition;" but no grounds are alleged in the objections for such an application. The Respondent's Counsel, however, at the argument contended that if the charges against the Petitioner were sustained his right to petition both as a voter and candidate would be gone, and that therefore proceedings should be staid. After fully considering the position thus taken, I am clearly of opinion that this Court was not intended, or clothed with power, to take or order to be taken, evidence on such a point;—and that our power is con-

fined to objections appearing in the papers filed, or by, perhaps, in some cases affidavits; alleging matters not in any way touching the substantial issues to be tried. In the next place, does bribery at an election by a candidate or voter, the proof of which is given on the trial of his petition against a Respondent, relate back so as to make him ineligible as a Petitioner? I have looked in vain for a precedent to sustain this contention, but have in the reports before mentioned found the practice to be such as would fairly permit an assumption to the contrary. Neither by Statute nor Common Law in England or in this country, so far as I can discover, has such a disqualification been created or contended for. In *Bushby's Practice of Elections by Hardcastle 4th Ed.* 1874, *p.* 11, it is alleged that "The Common Law of Parliament did not affect the civil status of "a voter who had been declared by a committee to have taken bribes; "and whatsoever doubt may rest on the question, whether apart from "the Statute Book a member unseated for bribery may be chosen for "a vacancy so caused, there is none as to the Common Law right of "the electors who shared in the offence to vote at the election on the "vacancy. Nor is an elector who has administered bribes disqualified "at Common Law from voting afterwards at that or any other elec- "tion." The dicta here go further than is requisite to sustain my proposition, which refers not to a case where the party had been previously to the election in question declared guilty of bribery, but to a case where the charge is that of bribery at the election in question. In the one case there would have been, if the Common Law so made it, a disqualification to *vote*, and *that* might have produced a disqualification to *petition*, which could not possibly exist in the present case, although the voter might be subsequently struck off for a cause which would not necessarily affect the voters' right to petition. The Petitioner claims the right to petition both as a voter and candidate, and I will hereafter refer to such claims separately. In the *Taunton case (cited in Wolferstein's Law and Practice of Election cases* 8) the objection that the Petitioner could not proceed because the sitting member was prepared to prove bribery against him was overruled. But his, it will be observed, refers to bribery at *the* election and not at a former one. The objection to bribery at *the* election was in that case overruled, and I can find

no contrary decision. I may here state that since making up my Judgment, and during this forenoon, I have seen in the *Canada Journal* for this month, which contains the reports of three Judgments on "preliminary objections" delivered last month by a Court composed of Chief Justice *Richards*, the Hon. *J. C. Spragge*, Chancellor, and the *Hon. J. J. Hagarty*, Chief Justice of the Common Pleas. I have not had time to read them all, but I have glanced at one (*the North Victoria case, p.* 217) which appears to be exhaustive, and to have been prepared with much deliberation by the learned Justice first named. I find that questions similar to those in this case were argued, and it is a matter of gratification to find that the leading positions taken by me are fully sustained by that learned Judge and his colleagues. Among other things I find by the head notes to that case, it was decided "That a candidate may be a Peti-"tioner, although his property qualification be defective if it was not "demanded of him at the time of the election. If he claims, his want "of qualification may be urged against his being seated, but he may "still shew that the Respondent was not duly elected if he so charge "it in his petition." Chief Justice *Williams* in that judgment, says, "If the candidate who now seeks the seat was not qualified under the statute to be elected, I take it for granted that the Respondent "will shew that under the 54th section of 'The Controverted Elec-"tions Act 1873.' It does not follow from this, however, that he may "not be a good Petitioner;" and he cites among others the *Taunton case* hereinafter cited by me and referred to in *Wolferstein p.* 8. He says further, "But a person alleging himself to be a candidate is "entitled *prima facie* to petition unless his disqualification is obvious "and incontestable;" and cites *Londonderry case*, (*W. and B.* 214) (1860.) He also refers to *Wolferstein p.* 5, which is hereinafter also quoted, and in respect of the *Petitioner's* qualification, in citing what the author says, he italizices, significantly the words "*at the time of the election.*" That learned Judge further says, "It is ob-"jected against the petition that the Petitioner did not possess the "necessary qualifications to be a candidate. He was a candidate in "fact. His right to be such is now only questioned; and unless there "is some case (binding on us) which expressly holds that if the pre-"liminary enquiry establishes the fact that the candidate was not

"qualified, therefore he has no *locus standi* to show that the sitting "member is not duly elected, we think we ought not to stay the en- "quiry as to the Respondent's right to hold the seat." While pleased thus to see the leading features of my Judgment sustained by such undoubtedly high authorities, I may express regret that the lateness of their reception precluded their use when considering the case and framing my Judgment upon it. The right of a candidate or voter to petition Parliament is one at Common Law, and any disqualification thereof must be by express statutory enactment. And the right to petition Parliament has I take it been transferred so as to give the same right to petition this Court. No cases were cited or alleged at the argument in support of this disqualification and I know of none. An accomplice in crime can originate in the public interests a charge against parties guilty in common with himself. He is a competent witness against them and his slightly corroborated evidence is sufficient for conviction. Upon the same public grounds I see no reason why one party guilty of bribery cannot be a complainant against another for the same offence before a competent tribunal. He certainly could originate a prosecution by indictment for bribery, and why not to avoid an election? The only difference so far as I can discover is as to the tribunals and the consequences of conviction. A person not a candidate or qualified voter cannot of course petition, as such unqualified person is not considered as constitutionally interested; but although the vote of a briber or bribed otherwise good may be struck off, or the seat withheld from a candidate guilty of bribery and both may be punished also by penalties, he is nevertheless one of those who originally was constitutionally allowed to petition against the election of a successful candidate and of that right he can only be deprived as I conceive by express enactment. Such being the case for the reasons given I think it not a good ground of objection to a Petitioner either as a candidate or voter to allege that he was at the election in question guilty of bribery or other corrupt practices. *Sec.* 10 *of the Controverted Elections Act*, 1873, regulates the qualifications of Petitioners thus:—

"(1). Some person who was duly qualified to vote at the election "to which the petition relates; or (2). Some person claiming to "have a right to be elected or returned at such election; or (3)

"some person alleging himself to have been a candidate at such "election."

The Petitioner in this case claims that he was qualified to petition under the 1st and 3rd of those provisions and there is no statutable disqualification that I can discover. How then we can decree one is to me unknown; and if inclined for other reasons to do so, who can say that by doing so, we would not contravene the intentions of the Legislature, and improperly conclude that it was *intended* to deprive a guilty candidate or voter of the right of petition? I can see many strong reasons to infer the opposite, but no sound one for that inference. The unsuccessful candidate although himself guilty may be and usually is the most interested of any, and though incapacitated from occupying the seat himself he is very usually anxious to unseat and disqualify his more successful opponent; and were he to be disqualified as a Petitioner it would tend greatly to diminish the number of complaints against corrupt practices and afford greater immunity to guilty and successful candidates; and to that extent to frustrate the objects which the laws against corrupt practices have in view. It should also be remembered that the interests at stake are not alone those of the Petitioner and Respondent. Chief Justice BOVILL *in the Taunton case,* (4 *L.R.C.P.* 365) says, "The enquiry is not as between party and party, but "one affecting the rights of the electors, the persons who are or "may be members or candidates, and the House of Commons "itself."

Mr. Justice BYLES *in the Brien case* (2 *O. & H.*, 34) says, "The "Petitioner being a trustee for the whole body of voters for the "Borough for the public generally, cannot withdraw unless he "complies with the provisions of the statute." Let us, however, consult some authorities as to the qualifications of Petitioners. "Some person qualified to vote, &c."—(*Wolferstein* 5) "This must "mean those who *rightfully* voted or whose qualification on the regis- "ter, whether they voted or not, was unimpeachable *at the time of "the election."* It will be observed that the last cited qualification from the author is the only one applicable to our act. Bribery *at* the election could not here affect the "Register" at all; and, in England, only bribery of which the party had been, prior to the election in question, found guilty.

"Some person alleging himself to be a candidate." (*Wolferstein p.* 5). "In the case of candidates petitioning, even less strictness is "required in the terms of the statement of the right to petition. "But * * * the Petitioner must be prepared to prove his lawful "claim, or that there was no lawful objection to his alleged candi- "dateship on the ground, for instance, *of his having been convicted "by a previous committee or Judge, of a disqualifying offence.*" The law only requires a Petitioner to allege himself *to have been* a candidate, &c., Sec. 3. The interpretation clause of the Controverted Elections Act says, "Candidate shall mean any person elected "to serve as a member and any person who has been nominated as, "or declared himself a candidate at an election." Suppose Petitioner, on nomination day, to have been a duly qualified candidate—he, as such is duly entered on the books of the Returning Officer and he continues as such till the declaration day; but suppose on *election* day he is guilty of bribery, would he be any less a candidate at the election, (and, under *any circumstances* a lawful one, at all events up to the commission of bribery) than if he continued pure throughout? He was without any fair contention to the contrary a "Candidate" *at the election;* and that to my mind is all the statute requires, whether he be one whose seat, if successful, may be afterwards taken away, or who if not successful, may be kept out on a charge of bribery. The law allows the respondent not to "set off" but to make an independent charge of corrupt practices against the Petitioner. The principle, I think, that would restrain a guilty "Petitioner" ought to restrain a guilty "Respondent;" but the latter when himself charged is by the law not only qualified but virtually invited by the language of the statutes to prefer charges of corrupt practices against the Petitioner, the intention being evidently to prevent a person tainted by corrupt practises from entering Parliament. As therefore no authority can be found to sustain the position contended for,—as the history of the trials of the numerous cases before mentioned, is at least by implication strongly against it, and as a necessary result of establishing it would be a contravention of the spirit of the statutes against corruption, and a frustration of the parliamentary attempts to check a public evil so generally demoralizing and injurious, my duty in the position I occupy compels

a refusal on my part to co-operate in an attempt to do so. I must therefore decide against the validity of the objections not only as preliminary ones but for all purposes except so far as may be necessary for the Judge on the trial to carry out the provisions of section 20 of the Controverted Elections Act, and it possibly may be eventually, as to the question of costs.

The question of costs of the argument in the meantime reserved.

ALEXANDER JAMES, ESQ., Q.C.:—Two questions arise under the Dominion Act of 1873, Chap. 27, Sec. 19, in relation to this case. First—whether a candidate guilty of means of corruption in the same election, and who does not claim the seat, is disqualified from petitioning against the sitting member. Second—whether this Court, or the Judge sitting to try this election, is the proper tribunal to try the petitioning candidate for the corruption charged in the preliminary objections so as to fix upon him the disqualification provided by the statute.

It was my original intention as one of the Judges of the Court to postpone the adjudication upon these preliminary objections and refer them to the Judges assigned to try the election, but when we met to consult upon our decisions we found we were all so decidedly and clearly of opinion that these objections could not be sustained, both upon our own reading of the statutes and upon the decisions of the English and Irish Judges upon the corresponding enactments in Britain—that we have resolved to dispose of them now.

Apart from the question of what public policy would seem to render advisable—namely, that one man accused of a crime should not be permitted to escape investigation by a *to quoque* argument—a principle, I need not say, wholly alien and unknown to our laws—let us look first at the language of the statute. What does it say?

It says that if the Petitioner claims the seat the Respondent may fyle recriminatory charges and proceed to the proof of them—and the decisions of the English cases shew that in such cases the charges against the Petitioner are first investigated. But there is

no statute and no decision in England that I know of that disqualifies a man from being a petitioner because he or his agents were guilty of bribery at that election unless he claims the seat.

Under the English act the election court is the tribunal expressly appointed by law to try an unsuccessful candidate, who is a Petitioner, for bribery, but his disqualification commences with his conviction, and cannot have and has not been held to have a retrospective operation and disqualify a man by an *expost facto* conviction. The law presumes a man to be innocent until he is *found guilty* and what the law presumes the electors may reasonably presume. The position of the candidate points him out as the most natural person to petition against his successful rival, and by his petitioning other electors are deterred from so doing. If a Petitioner wishes to withdraw his petition he can only do so after an opportunity has been afforded to other electors to come forward and take his place as Petitioner against the Respondent's return. But were we in such a case to declare the Petitioner disqualified to petition, the electors would be deprived of the opportunity of coming in and disputing the seat. He might be clearly found to have obtained the seat by the most corrupt and scandalous means, by violence, intimidation, fraud, misconduct of officials or gross mistake. In short, his election might have been vitiated by every circumstance which could by any possibility have rendered the election void. It might be provable beyond a doubt that but a small minority of the duly qualified electors were his supporters and yet he would hold his seat in despite of the great majority of those whom he professed to represent, not because it was right, but because his opponent had been guilty of some fraud or corruption. It is satisfactory to find that we are fortified by the decisions of the most eminent English Judges in our unanimous conclusion that the section of the acts under consideration compels us not to sustain a position so subversive of the rights of the electors who are the parties really interested far more than the canddiate in the result of the proceeding.

Our Statute of 1873, Chap. 27, Sec. 19, enacts that if any candidate who shall have been returned is proved guilty before the "*proper tribunal*" of using, during any election, means of corrup-

tion, he shall be incapable of being a candidate or being elected or returned during the Parliament for which such election was held. The English Parliamentary election Act of 1868, 31 and 32 vic., c. 125, Sec 43 enacts that if by *the report of the Judge on the Election petition,* it is found that bribery has been committed with the knowledge of any candidate, he shall be deemed guilty and shall lose his seat, if elected, and be incapacitated for seven years of being elected and of holding certain offices.

The principal distinction as regards this case between the two enactments is that the English Statute expressly gives the jurisdiction to try either or both candidates, to the election Judge. Ours gives no such jurisdiction but refers it to the *proper tribunal* whatever that may be. But although the jurisdiction in England is clearly in the Judge we have a very recent and express decision on the point confirmatory of the view, I now take. Mr. Justice WILLES *in the Blackburn case,* 1, *O. and H.* 199 upon application to go into recriminatory evidence said that inasmuch as the seat is not claimed the Respondents have it not in their power to set up a recriminatory case." If there had been any doubt on any mind upon reading of the statute, this decision clear and peremptory as it possibly could be—would certainly have removed it. It is satisfactory at the same time to know that while this view of the law is emphatically sustained by the very highest and latest modern authority, it is not in contradiction so far as I am aware of any of the older cases cited at the argument or referred to in the text books. The law on this point may therefore be considered as well settled.

The next question is whether the election judge about to be engaged in trying the pending controversy is the "proper tribunal" referred to in the section. This is now a practical question because the Judge will probably be asked at the trial to hear evidence of the criminality of the Petitioner in order to disqualify him from being a candidate hereafter. I consider the duty of the Judge to be, to try the Controverted Election of the Respondent, and that he has no power to do anything else except when expressly, or by necessary implication authorized, by the statute. If the Legislature had meant the Judge to be the tribunal to try any but the Respondent they

would have said so; but I cannot find a single word in the Act to authorize a Judge to assume any such jurisdiction at the instance of a Respondent. I cannot discover in the statute or any decided case any shadow of such an authority and I look upon section 20 of the Act as having a different meaning.

Had the words of the English Act been in the Canadian Statute it would clearly be the duty of the Judge at the ensuing trial to investigate any charges against the Petitioner upon proper proceedings being taken with that object, but our Legislature with this clear enactment of the English Statute before their eyes, and when they were using that Act as a model for the legislation they were framing, saw fit to omit these very important words, and thereby to signify in the most pointed manner that they considered it an anomaly that while other Courts exist with ample jurisdiction, and power to convict and punish parties guilty of bribery at elections, a Court constututed for a different purpose—namely to try the validity of the election, should be transferred into a Criminal Court to try without the aid of any jury parties accused of very serious crimes and to condemn them in very serious penalties. I think a judge before he assumed any such power should be thoroughly satisfied that he was not usurping it without authority and without necessity.

If the candidate can be tried for bribery before the Judge why not a voter? Why not any body else connected with the election? The statute gives no more power in one case than in the other. It may perhaps be answered that the law prescribes no disqualification to voters or others guilty of corrupt practices, but even if this be the fact the statutes of all the Provinces are incorporated with the Dominion Act by Sec. 1 of Chap. 27, and it is not at all probable that any one of them is so far behind the age in this respect as to have no statutory disqualification for voters guilty of bribery or being bribed.

It may further be asked if the Parliament intended that the Supreme Court should be the tribunal, why would it not have said so? The reason probably was that in the different Provinces the Courts are differently constituted, have jurisdictions varying

widely from each other and administer in some cases widely different systems of law. It is quite sufficient that the Legislature presumed that in each of them Courts existed with power to try charges of bribery at elections, and left the execution of the law to these tribunals by whatever name they might be called when applied to in a proper manner. If my view of the law be correct, the sitting member is deprived of no right or advantage which he might not have secured had he seen fit. The Supreme Court which unquestionably has jurisdiction to punish bribery at elections has held a term in Cumberland since this election was held. Had the Petitioner been indicted then, he would, if found guilty, as charged in these preliminary objections, have been convicted by a jury of bribery and the other corrupt practices charged, which conviction would have subjected him not only to the disqualifications prescribed in sec. 19, but to very severe pecuniary penalties. Ample means and opportunities thus exist for enforcing sec. 19, without this Court assuming to itself a Criminal Jurisdiction not conferred on it by the statute under which it is constituted. That such is the tribunal intended by this section I am firmly convinced. I am satisfied that the language of the statute, Chap. 28, Sec. 10, which is almost identical with that of the English Act, was framed with a view to the known state of the law on this question. It gives the right to petition not to persons claiming to vote—nor even as in the English Act to persons who had actually voted—but only to persons duly qualified to vote at the election—while in the case of candidates it gives the right of petition to "some person *claiming a right* to be returned or elected," and also "some person *alleging himself to have been a candidate* at such election." The section does not, as in the case of a voter, require that a candidate, in order to be allowed to petition, must be a duly qualified candidate. This marked and studied distinction in the language accords with what I consider the settled law on the subject, and I think it is not a mere coincidence but an intentional alteration of the law from the English Act. At the same time I do not wish to be understood as deciding that if a candidate came forward as a petitioner who had no qualification whatever,—for instance an alien,—he might legally be a petitioner. I give no opinion on that point. I only decide that a person who

becomes a candidate and at the time of becoming a candidate is qualified, may become a petitioner notwithstanding he may, during his candidature, have been guilty of corrupt practices. The two cases are clearly distinguishable on substantial ground.

Neither do I consider it necessary to decide whether a voter who has been guilty of bribery may be a petitioner, because if the petitioner is qualified as a candidate, it is sufficient for the purposes of this enquiry. The English cases on this point, which are conflicting, are to be found in 1 O. & H., 176—Ib. 199 and 2, O. & H., 15.

Our decision in this case does not preclude evidence of corrupt practices on the part of the petitioner. Sec. 20 of Chap. 28 requires the Judge, when corrupt practices are charged in the petition to enter upon a general investigation of the corrupt practices which occurred at the election by whomsoever committed, and in this case it will be his duty to do so and report the result to the speaker as required by the statute.

In accordance with the judgment of the Court, an order passed in the following terms:—

On argument of the preliminary objections made to the petition filed herein, it is ordered that the said preliminary objections be over-ruled and disallowed, the costs to abide the further order of the Court or a judge herein.

Halifax, 17th August, 1874.

By the Court,

(Signed.) BENJAMIN RUSSELL,
Clerk of the Court.

WILLIAM HENRY ALLISON, Petitioner,

vs.

MONSON H. GOUDGE, Respondent.

Decision on preliminary objections. Sufficiency of petition. Jurisdiction of the Court.

In this cause the petition was filed in the following form:—

IN THE ELECTION COURT.

"*The Controverted Elections Act*, 1873."

Election for the County of Hants, holden on the Fifth day of February, in the year of our Lord One Thousand Eight Hundred and Seventy-four.

The petition of William Henry Allison, of Newport, in the County of Hants, farmer, whose name is subscribed hereto,

Respectfully sheweth:

1. That your Petitioner, William Henry Allison, was duly qualified to vote at, and was a candidate at said election.

2. And your Petitioner states that the election was holden on the fifth day of February last, A.D. 1874, when Monson H. Goudge and your Petitioner were candidates, and the Returning Officer has returned Monson H. Goudge as being duly elected.

3. Your Petitioner complains that the said Monson H. Goudge was undnly elected at said election.

4. And your Petitioner further says that the said Monson H. Goudge and his agents and servants were guilty of bribery and corrupt practices and of using undue influence and intimidation at such election within the meaning of the Controverted Elections Act of 1873, and the several other acts in force in that behalf.

5. And your Petitioner says further that the said Monson H. Goudge and his servants and agents at said election were respectively guilty of bribery and corrupt practices, and of employing means of corruption with intent to corrupt and bribe certain of the electors qualified to vote at said election, to vote for the said Monson H. Goudge.

6. And your Petitioner says further that the said Monson H. Goudge and his agents and servants threatened certain electors qualified to vote at said election, and that if they did not vote

thereat for him, the said Monson H. Goudge, they would lose certain offices and salaries held by and coming to them.

7. And your Petitioner says further that the said Monson H. Goudge and his agents and servants threatened certain electors at such election qualified to vote thereat, of whom some held offices under the Government of Canada, and others under the Government of Nova Scotia, that if they did not vote for him, the said Monson H. Goudge, they would lose said respective offices so held by them as aforesaid.

8. And your Petitioner says further that the said Monson H. Goudge and his agents and servants at said election were guilty of bribery and corrupt practices, and were guilty of employing means of corruption with the intent to corrupt and bribe certain of the electors to vote at said election, from voting for the said William Henry Allison, your Petitioner.

9. And your Petitioner says further that the said Monson H. Goudge and his agents and servants at said election threatened certain of the electors qualified to vote at such election that if they did not abstain from voting for the said William Henry Allison, they would lose certain offices and salaries held by and coming to them for the purpose of keeping back said electors, qualified to vote at said election, from voting for the said William Henry Allison, your Petitioner.

10. And your Petitioner further says that the said Monson H. Goudge and his agents and servants at said election, at the costs and charges of the said Monson H. Goudge, opened and supported a house or houses of public entertainment for the accommodation of electors thereat.

Therefore, and for the other reasons in the several paragraphs of this petition contained, your Petitioner prays that it may be determined that the said election of the said Monson H. Goudge is null and void, and that the said Monson H. Goudge shall be incapable of being a candidate or being elected or returned during the present Parliament of Canada.

Dated at Halifax this twenty-third day of March, in the year of our Lord One Thousand Eight Hundred and Seventy-four.

(Sd.) WILLIAM HENRY ALLISON.

The following preliminary objections were filed on behalf of the Respondent by Otto S. Weeks, Esq., as Attorney.

IN THE ELECTION COURT.

"The Controverted Elections Act 1873."

Election for the County of Hants holden on the fifth day of February, in the year of our Lord One Thousand Eight Hundred and Seventy-Four.

Dominion of Canada,
Province of Nova Scotia,
To wit:

WILLIAM HENRY ALLISON, Petitioner,

vs.

MONSON H. GOUDGE, Respondent.

The said Respondent, by way of preliminary objections and grounds of insufficiency against the petition herein and the complaints therein contained and any further proceedings thereon says:—

1. The said Election Court has no jurisdiction in or about the matters alleged in said petition, and cannot take cognizance of the same or adjudicate thereon.

2. Said petition differs materially in form and substance from the requirement of Chapter 28 of the Acts of 1873 of the Parliament of Canada and the rules made thereunder and the other Acts, and the law in that behalf, and is wholly irregular and insufficient.

3. It does not appear by said petition or any part thereof that the same has been made in relation to anything done in the Dominion of Canada or in any and what part or province of said Dominion, or that the same was made or has relation to any election held in said Dominion of Canada or any part or province thereof, or whether said election was civic, Local or Dominion, or that the Petitioner resides or did reside at the time of said election in said Dominion or in any part or province thereof; nor does the said Petitioner aver or set forth that the election referred to therein was an election for the House of Commons of said Dominion of Canada.

4. As to the several paragraphs and complaints of said petition there is not in any of the said paragraphs or in all thereof any complaint sufficiently and legally set forth to shew any undue return, or that the Petitioner is entitled to the relief by said petition sought.

5. As to the 4th, 5th and 8th paragraphs of said petition the Respondent says that they do not contain any sufficient charge within the law and the statutes in that behalf relating to elections; nor is there any sufficient statement of any complaint; nor is it stated that the acts therein set out were done and committed to procure Respondent's election or return.

6. As to the sixth and seventh paragraphs of said petition Respondent says that they do not contain any sufficient charge within the law or the statutes in that behalf relating to elections, nor is there any sufficient statement of any complaint, nor is it averred that the acts alleged in said sixth and seventh paragraphs to have been done by the Respondent or his agents and servants were done and com-

mitted with intent to corrupt or bribe any elector to vote for Respondent, or to keep back any elector from voting for any other candidate, or to procure the election of said Respondent.

7. As to the tenth paragraph of said petition Respondent says that there is no ground of complaint legally or sufficiently set forth to entitle the Petitioner to have the prayer of said petition granted, and it is not alleged that the acts done or things complained of were done or used to procure the election of said Respondent.

8. As to the ninth paragraph of said petition the Respondent says that it contains no legal or statutable complaint set forth, and the alleged grievances or acts therein referred to are not sufficiently described, nor is it stated that the said grievances or acts were done or used to procure the election of said Respondent.

9. And as to the prayer of said petition, while it is prayed that said election may be declared void, it is not prayed that the said return be declared void.

10. There is no proper service or return of said petition.

Halifax, 18th April, 1874.

(Sgd.) OTTO S. WEEKS,
Attorney of said Respondent.

To the Petitioner within named.

The objections were argued before the full Court by R. L. Weatherbe, Esq. and Otto S. Weeks, Esq., in support of the same, and Hon. Jas. McDonald, Q.C., contra.

The Court now (August 17) delivered judgment:—

HON. WM. A. HENRY, Q.C.:—The petition in this case sets out in seven paragraphs sundry illegal acts and corrupt practices against the Respondent and others at the election, and prays that the election may be set aside, but does not claim the seat.

The petition is headed "In the Election Court. The Controverted Elections Act 1873." "Election for the County of Hants holden on the Fifth day of February, in the year of our Lord One Thousand Eight Hundred and Seventy-Four." The first paragraph alleges that "petitioner was duly qualified to vote at and was a candidate "at the said election," and the second that "he and the Respondent "were candidates, and that the Respondent was returned as duly "elected." The next paragraph complains that "the Respondent "was unduly elected." Ten preliminary objections have been filed and argued before us upon the sufficiency of which to set aside the petition we have to decide. The first is to the jurisdiction of the

Court to take cognizance of the matters in the petition alleged or to adjudicate upon them, owing to the incapacity of the Dominion Parliament to confer upon us the necessary powers. In discussing the point of objection thus raised, I cannot throw out of consideration the question of inherent right of every parliamentary representative body to regulate and determine the course to be adopted for trying questions raised as to the validity of the election of its own members, and the peculiar right of the parliament of which the representative body formed a part, to regulate how and by what means the election of its members should be held, and consequently the mode and manner of trying contested elections. Such inherent powers have always been conceded to the parliaments of all the British North American and many other colonies of Great Britain. Parliament in England till lately had exclusive jurisdiction in such cases, and always claimed it, and the same has always been claimed in the British North American and other colonies. Statutory enactments have regulated the trial of contested elections; and if we have not lost by Union what each province had a constitutional right to before, and by becoming larger have not really become smaller, we still possess that constitutional right. It may be objected that our parliamentary rights in that respect must now depend upon the interpretation to be given to the Imperial Act entitled, "The British North America Act 1867." Let it be so, and still a sufficient answer to the objection may be given. The preamble to that Act recites the desire of the provinces named "to be federally united into one "Dominion under the Crown of the United Kingdom of Great Britain "and Ireland, *with a constitution similar in principle to that of the "United Kingdom.*" We must assume therefore, unless the contrary plainly appears that the Imperial Parliament by that Act intended to give and provide and did give and provide what is in the preamble recited as the desire of the colonies to have, "*a constitution similar "in principle to that of the United Kingdom;*" and hence it may be legitimately argued that as the "Constitution of the United Kingdom" gives to its Parliament the exclusive right to pass all laws relating to representation in Parliament and the trial of contested elections, the Imperial Act, if the opposite does not appear from it (and it does not,) gives by implication at all events the same plenary powers to the Parliament of the Dominion; and that, without any

authority expressed in words. Section 18 of that Act, however, aids the argument as to such implication. It provides that "the "privileges, immunities and powers to be held, enjoyed and exer- "cised by the Senate and by the House of Commons and by the "members thereof respectively shall be such as are from time to time "defined by Act of the Parliament of Canada, but so that the same "shall never exceed those at the passing of this Act, held, enjoyed "and exercised by the Commons House of Parliament of the United "Kingdom of Great Britain and Ireland and the members thereof." The Dominion Parliament, in delegating the power to this Court to try controverted elections, has not in my judgment exceeded the authority given by that section. It may, however, be said that the section has reference to the powers, &c., of the Senate and House of Commons separately, and I admit it, and still contend that my construction may nevertheless be upheld. I will, however, now proceed to cite from that Act what I consider express authority in the premises. In Sec. 91 of the same Act, under the significant heading, "Powers of Parliament," you may thus read: "It shall be lawful for "the Queen, by and with the advice and consent of the Senate and "House of Commons, to make laws for the peace, order and good "government of Canada in relation to *all matters* not coming within "the classes of subjects by this Act assigned exclusively to the "Legislatures of the Provinces, and for greater certainty, but not "so as to restrict the *generality* of the foregoing terms of this sec- "tion it is hereby declared that (notwithstanding anything in this "Act) the exclusive Legislative authority of the Parliament of Can- "ada extends to all matters coming within the classes of subjects "next hereinafter enumerated, that is to say." Then the "classes of subjects" are given, but not, I confess, naming the matter now in question. The power is, however, given "to make laws for the peace, order and good government of Canada *in relation to all matters,*" but with certain exceptions—What are those exceptions? Clearly only "matters coming within the classes of subjects exclusively assigned to the Local Legislatures." If then the matter in question is not assigned *exclusively* to the Local Legislature, but is expressly excluded from the matters so assigned, it must necessarily be one of the subjects in regard to which by the language of that section, "it is lawful for the Queen, by the advice of the Senate and

House of Commons, to make laws." I have carefully read over and considered the "exclusive powers of Provincial Legislatures" and can find no approach to the subject in question in any of the "classes of cases" referred to the Local or Provincial Legislatures. If, therefore, the power of Legislation as to contested elections for the House of Commons, is not vested in the Provincial Legislature, it must, of necessity, be in the Dominion Parliament or nowhere; and in view of the whole Imperial Act and its preamble, I must conclude in favor of the first alternative as I cannot conceive that the British Parliament intended that such power should not somewhere exist. Let me add one more quotation from the same act. Sec. 101 provides "the Parliament of Canada may, notwithstanding anything in this Act, from time to time provide for the constitution, maintenance and organization of a general Court of Appeal for Canada, and for the *better administration of the Laws of Canada.*" What is meant by the latter clause? What Laws of Canada? Without speculating as to what may *not* be included in consequence of the subject being one for the exercise of the powers of the Local Legislatures exclusively, no person, I take it, will contend that the Parliament of Canada, having the exclusive power to legislate as to all the enumerated subjects, such as the Custom and Inland Revenue, patents and copyrights, militia, military and naval defence and others, would not have the right to establish Courts to administer the "laws of Canada" enacted in regard thereto. The right of the Parliament of the Dominion to enact laws, such as Chap. 27, (Acts of 1873) "making provision for the election of members to serve in the House of Commons," is not contested, and I therefore must conclude that the same power exists for the establishing a court or courts to try the merits of election petitions as for the other classes of subjects named, and that the jurisdiction of this Court, established as it is under the Controverted Elections Act, 1873, cannot be questioned. Having devoted so much time to the first objection, and the remaining ones being similar to those in the "Pictou Election case," I now only refer to my judgment in that case and state that for the reasons so fully given therein, and which apply to this case in common with that, I feel bound to overrule all the remaining objections.

The question of the costs of the argument is also reserved in this case.

J. W. JOHNSTON, ESQ., Q.C.:—The first preliminary objection is aimed at the jurisdiction of the Court; it alleges that the Court has no jurisdiction in the matter of the petition and cannot take cognizance of the same or adjudicate thereon. The Act under which we sit is chap. 28, 1873. It is entitled an Act, "to make better provision respecting election petitions and matters relating to Controverted Elections of members of the House of Commons," and does not clash in the least with *sec.* 14 *of the British N. A. Act,* which gives the administration of justice, and the constitution of Provincial Courts to the Provincial Legislatures. I look upon the Court, established under chap. 28, 1873, as a Dominion Court, having for convenience sake branches in the several Provinces;—the cognizance of the Court is over matters purely Dominion, and to say that the Parliament of Canada has no power to delegate to whom it chose the authority inherent in itself to try the election of members to sit in the House of Commons is a startling proposition and one that requires to be fortified by much stronger arguments than any attempted to be adduced before us. And whatever question might possibly have arisen in cases where the Judges were appointed by the Local Executive, none can arise where as with us the Judges hold their appointments directly from the Dominion Government.

The second and third objections attack the form and substance of the petition, alleging, as in the Pictou election, that the provisions of the Act, and the rules have not been complied with; and that it does not appear that the petition was made in relation to anything done in the Dominion of Canada, or in what Province thereof, or in relation to what election, or whether said election was Civic, Local, or Dominion, or that the election was an election for the House of Commons.

I look upon this petition in this respect, as much more faulty than the Pictou one. The rules had been published and were in force some days before the petition was signed; the Judges under the authority of the Act had prescribed a form, and, not unnecessarily to tie parties, had directed that that form or one to the like effect,

should be sufficient. Now in the face of this, the petition not only does not follow the form, but is not even to the like effect. The omissions were most important, and if the Petitioner had studied how to ignore the authority of this Court in the premises he could not more effectually have accomplished his object.

The Dominion of Canada,
Province of Nova Scotia,
To Wit:

are omitted altogether in the petition and their place is not supplied by any words giving similar information. The statement is pertinent, and was not required by the Judges from any unmeaning caprice. A correct form of the petition in my judgment would have been as follows: —

IN THE ELECTION COURT.

Dominion of Canada,
Province of Nova Scotia,
County of Hants.
To Wit:

"*The Controverted Elections Act*, 1873."

Election of a member for the House of Commons for the electoral district of Hants, holden, &c.

The above order need not have been followed nor the same phraseology used, but the same amount of information ought in some form or other to have been conveyed and cannot be dispensed with. The election is referred to as the said election and there are no words to which "said" can refer except election for the County of Hants. These objections I cannot hold to be merely formal ones, and my remarks on the Pictou Election applying with equal force to this case. I need not here take up time by repeating them, but they are to be considered as forming part of my judgment in the case. In my opinion the petition is so faulty that it cannot be proceeded with in its present shape.

ROBERT DOULL, Petitioner,

vs.

JAMES W. CARMICHAEL and JOHN ADAM DAWSON, Respondents.

Charges of bribery, &c., against an unsuccessful candidate, not being a Petitioner, struck out.

The nature of the question raised in this case is fully stated in the judgment of the Court delivered by the Hon. W. A. Henry, Q.C. A rule *nisi* was taken out August 24th by Hon. James McDonald to strike out the answer on the ground that it contained charges of bribery and other corrupt practices against the said Hon. James McDonald, who was an unsuccessful candidate at the election, but not a petitioner. The rule was argued before the full Court on August 27th by the Hon. James McDonald, Q.C., and R. L. Weatherbe, Esq.

Hon. W. A. Henry, Q.C., now (August 29) delivered the judgment of the Court as follows:—

The answer in this case lately filed, contains amongst other things independent charges of bribery and other corrupt practices against the Hon. James McDonald, an unsuccessful candidate at the election in question but not a Petitioner. A rule *nisi* to strike out the answer on the ground that such references were irregular and could not form the substance of issues to be tried, and that he was not a party in the proceedings before the Court the introduction of such charges should vitiate the whole answer.

The matter having been argued, we have now to give judgment.

It has already been decided, (in the "Cumberland" case,) that where the seat is not claimed by or for a petitioning candidate recriminatory charges cannot be made as such; and that questions of such corrupt practices may only be inquired of by the presiding judge on the trial, under Section 20 of the Controverted Elections Act.

To allow the charges alluded to, to remain as issues to be tried would be in direct conflict, not only with our judgment in that case but with all the rules of legal procedure which govern the trial of issues raised by a complaint and answer.

An irrelevant issue is here tendered which cannot affect the true ones to be tried, and being therefore irregular we must decide to make absolute the rule to that extent; but as we cannot make the rule absolute to the extent applied for, no costs will be allowed on either side.

GEORGE HIBBARD, Petitioner,

vs.

CHARLES TUPPER, Respondent.

Recriminatory Charges struck out of the answer.

In this case a rule nisi was taken out on August 27th, by R. L. Weatherbe, Esq., to strike out the first paragraph of the answer, on the ground that it contained recriminatory charges against the Petitioner, who had not claimed the seat. The rule was argued before the full Court on August 29th, by R. L. Weatherbe, Esq., in support of the rule and J. S. D. Thompson, Esq., *contra*.

Hon. W. A. Henry, Q.C., on the same day, delivered the judgment of the Court as follows:—

We have considered the question arising on the rule to strike out the answer in this cause, and we are now prepared to deliver judgment. The 14th Section of "The Controverted Elections Act, 1873," provides that within five days after the expiration of the time limited for objecting to the security, or after the security has been established, the Respondent may present in writing any preliminary objections or grounds of insufficiency which he may have to urge against the petition or any further proceedings thereon, and shall in such case at the same time file a copy thereof for the Petitioner. The Election Court or any Judge thereof shall thereupon hear the parties upon such objections and grounds, and shall decide the same in a summary manner. Before this Act was passed there was no mode in England or in Canada for inquiring into preliminary questions except on the trial. The Legislature, then, has expressly given the power to this Court to inquire into preliminary objections. The Court, however, is authorized by the 32nd Section of the Act, to make general rules and orders for the effectual execution of the Act, and the 33rd Section provides further that "until rules of Court have been made * * * and so far as such rules do not extend, the principles, practice and rules on which election petitions touching the election of members of the House of Commons in England, are at the time of the passing of this Act dealt with, shall be observed so far as consistently with this Act they may be observed by such Election Court or any Judge thereof." This provision does not fully meet the case before the Court, and we cannot find any

case in the English practice where a Judge is called upon to act in the manner in which we are called upon here. There is nothing therefore in these sections to give us expressly the power that we are here called upon to exercise, and we are driven to inquire what is the proper course for us to pursue under the present circumstances. I do not think that the mode is important. The great object is to notify the opposite party what it is intended to ask the Court to do. Here a rule *nisi* was taken out, and although there is no exactly similar process in the Supreme Court if it answers the desired object there is nothing to prevent us from adopting it. There would be no question about our power to make a rule to regulate the practice in this respect. I do not see that there is anything to prevent us from adopting any manner of settling these disputes which is not contrary in principle to the proceedings of the Supreme Court. Where proceedings in that Court are calculated to embarrass a party the Court will strike out or amend them. Under these circumstances I think we have the power to do the same thing. We consider that the putting of these unnecessary complaints in the answer is calculated to embarrass the trial of the proper issues, and that such a proceeding is in opposition to the main judgment delivered in this case. We there decided that recriminatory charges could not be made, and that corrupt practices, where the seat was not claimed, could only be inquired into on the trial before the Judge in the performance of his duty under the 20th Section. We believe that that decision is sound, though if we had seen anything in the meantime to change our opinion, I have no doubt that my colleagues and myself would have been willing to adopt the course that was shown to be preferable. Not having seen anything to alter our views, we are of the opinion that this rule must be made absolute, and inasmuch as this objectionable clause was introduced after the judgment that we delivered on the main question arising on the preliminary objections, and as the application of the Petitioner has been wholly successful, we think we are bound by these circumstances to give costs. The reason why no costs were given on the rule in *Doull vs. Carmichael*, was that neither party was wholly successful. If the application of the Petitioner in that case had been limited to the portion of the answer that we struck out, we would have felt bound to give costs.

NEWTON L. MACKAY, Petitioner.

vs.

WILLIAM McDONALD, Respondent.

Recriminatory charges against the Petitioner struck out of the answer.

In this case R. L. Weatherbe, Esq., took out a rule nisi on August 31st, to strike out of the answer all the paragraphs except the first, as containing recriminatory charges, and on the ground that the allegation in said clauses raised an improper issue and were in no manner an answer to the matters contained in the petition; and that the same were irregular and contrary to law.

The rule was argued on September 1st, by R. L. Weatherbe, Esq., in support, and Hon. James McDonald, *contra.*

Hon. W. A. Henry, Q.C., now (September 1st), delivered the judgment of the Court as follows:—

We have already decided that where the seat is not claimed, no recriminatory charges can be gone into as such, even before a Judge on the trial, and that they can only be inquired into under the section already mentioned in our previous judgment, (Section 20). We are also of opinion that the Petitioner in this case being a member of the House of Commons, is well qualified to petition, and we have come to the conclusion that inasmuch as the statute points out one mode, and only one of unseating a candidate, it is beyond the power of this Court to inquire into the propriety of his return for any reason unless in the manner prescribed by the statute. We think that the case does not differ materially from the cases already decided. The Legislature has already provided for the trial of the correctness of the returns of all members of the House of Commons, and if we were to adopt a different mode we would be going beyond the authority that the statute gives us. The fact that the petitioner is a member of the House of Commons does not alter the nature of the issues to be tried. Had a case been given to us showing that the course which we are asked by the Respondent to follow was a proper one, we should have felt bound to follow it, but in the absence of any such case we can only try the regularity of the election and return in the manner pointed out by the statute and in no other. I

make these remarks without reflecting upon the fact which we may know not as Judges, but merely incidentally, that there is a petition filed against the Petitioner in this case, upon which the merits of his return will be decided. Independently of this circumstance, we feel that we would have no right to allow the trial of the recriminatory charges, and that the clauses referring to such charges should be struck out. The Petitioner is an elector. The Respondent holds the seat rightfully or wrongfully, and the Petitioner, as an elector, has a right to demand that no person should occupy that seat unless duly elected. He had therefore a right to petition, which is not in any way affected by the fact of his being a member himself. The words of the statutes are not to be got over without a case, and the rule will be made absolute with costs.

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